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o. 84-489-CFX
tatus: GRANTED

Title: Pennsylvania Bureau of Correction, Petitioner
v.
United States Marshals Service, et al.

ocketed:
eptember 24, 1984

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Vickers, Maria Parisi, Zimmerman, LeRoy S.

Counsel for respondent: Solicitor General, Axelrod, Barbara B., Martinez, Angela L., Garland, Richard

ry	Date	Note	Proceedings and Orders
1	Sep 24 1984	G	Petition for writ of certiorari filed.
2	Oct 31 1984		DISTRIBUTED. November 21, 1984
4	Nov 14 1984		Order extending time to file response to petition until December 18, 1984.
5	Nov 19 1984	P	Response requested.
6	Dec 17 1984		Order further extending time to file response to petition until January 17, 1985.
7	Jan 16 1985		REDISTRIBUTED. February 15, 1985
8	Jan 17 1984	X	Brief of respondent U.S. Marshals Service in opposition filed.
9	Feb 19 1985		Petition GRANTED. Justice Powell DUT.
			**********
11	Mar 11 1985		Order extending time to file brief of petitioner on the merits until May 6, 1985.
13	Mar 11 1985		Order extending time to file brief of respondent on the merits until June 28, 1985.
14	May 6 1985		Joint appendix filed.
15	May 6 1985		Brief of petitioner PA Bureau of Correction filed.
16	Jun 3 1985		Record filed.
17	Jun 28 1985		Brief of respondents U.S. Marshals Service, et al. in opposition filed.
18	Jul 18 1985		SET FOR ARGUMENT, Tuesday, October 15, 1985. (1st case).
19	Aug 7 1985		CIRCULATED.
20	Sep 18 1985	X	Reply brief of petitioner PA Bureau of Correction filed.
21	Oct 15 1985		ARGUED.

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84-4890

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FILED
SEP 24 1984
ALEXANDER L. STEVAS
CLERK

No. 84

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

Commonwealth of Pennsylvania
Bureau of Correction

Petitioner

v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE. GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a district court has the authority to direct the United States Marshal's Service to share responsibility with state officials for the production of state inmates to appear in federal district court for the trial of a civil action in which neither the state nor its officials is a party.

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit is as follows:

RICHARD GARLAND

v.

JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

United States Marshals Service,

Intervenor-Appellant

Commonwealth of Pennsylvania,
Bureau of Correction

Intervenor-Appellee

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term 1984
No. 84-
Commonwealth of Pennsylvania
Bureau of Correction

Petitioner

v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE. GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Attorney General of the Commonwealth of Pennsylvania, on behalf of the Commonwealth of Pennsylvania, Bureau of Correction, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 4a - 45a) and is reported at 737 F.2d 1283. The memorandum and order of the magistrate (App. 46a - 65a) is not reported.

JURISDICTION

The judgment of the court of Appeals (app. 1a - 3a) was entered June 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The All Writs Act, 28 U.S.C. §1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C. § 2241, provides in pertinent part:

(c) The writ of habeas corpus shall not extend to a prisoner unless --

(5) It is necessary to bring him into court to testify or for trial.

3. 28 U.S.C. §2243 provides in pertinent part:

The writ ... shall be directed to the person having custody of the person detained.

* * *

[The] person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

4. 28 U.S.C. §567:

Under regulations prescribed by the Attorney General, each United States Marshal shall be allowed --

* * *

(2) the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expenses of prisoners and guards ...

5. 28 U.S.C. §569:

(a) The United States marshal of each district is the marshal of the district court .... and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, ... and command all necessary assistance to execute their duties.

STATEMENT OF THE CASE

This action began when a prisoner,[1] Richard Garland, brought a civil rights suit pursuant to 42 U.S.C. §1983 against various Philadelphia County officials alleging that these defendants had violated his rights by beating and harassing him. The matter was referred to a magistrate for disposition on the merits pursuant to 28 U.S.C. §636(c)(1). In the course of the proceedings, on February 8, 1983, the magistrate ordered the superintendents of various state prisons to transport the plaintiff-inmate and four inmate witnesses to the county prison nearest to the United States Court-

[1]Plaintiff, Garland, was confined in a Philadelphia County jail when he initiated the lawsuit; however, at all times relevant to the issues raised in this petition, he was in custody of the Pennsylvania Bureau of Correction at its institution at Huntingdon, Pennsylvania.

house in Philadelphia. In the same order, the magistrate further directed the United States Marshal [hereinafter "marshal"] to transport the inmates from the county jail to the federal court and to maintain custody over these inmates for the duration of the trial.

The marshal, an intervenor in the action,[2] moved for reconsideration of that portion of the magistrate's order which apportioned to it the responsibility of transporting the prisoner-witnesses from the county jail to the federal courthouse and, thereafter, to maintain custody during trial. The marshal's motion for reconsideration was denied

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[2]On April 20, 1983, intervenor status was granted to the Commonwealth of Pennsylvania, Bureau of Corrections and to the marshal, nunc pro tunc as of May 7, 1982 and January 19, 1983 respectively.

and the marshal appealed.[3] The Third Circuit Court of Appeals held that the district court, and therefore the magistrate, has the statutory authority to direct the marshal to maintain custody over a state prisoner-witness in the federal courthouse, but that the court lacks authority to direct the marshal to transport that prisoner between the county jail and the federal courthouse.

In the lead opinion by Judge Gibbons, the court of appeals began its analysis of the issue by focusing on the source of judicial authority to issue writs, process and orders. It pointed out that 28 U.S.C. §569(b), relied upon by the magistrate, is merely a directive to the marshal to execute

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[3]The subject of the appeal is entirely collateral to the underlying action, disposing of the transportation issue fully and finally. Review of final orders in cases tried before a magistrate by consent of the parties lies with the court of appeals. 28 U.S.C.§636(c)(3).

writs when these have been issued pursuant to some other authority. The court then turned to the All Writs Act, 28 U.S.C. §1651, to determine whether this statute authorizes a district court to order the marshal to assume transportation responsibility for state inmates. The court did not find such authority in the language of the All Writs Act, holding instead, that the magistrate's order was, in fact a writ of habeas corpus ad testificandum properly addressed to the custodian, with a mandamus added to it. The court then concluded that the mandamus order was inappropriate, relying upon McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821). Judge Gibbons did conclude, however, that the magistrate properly ordered the marshal to maintain custody of the prisoners while they are in the federal courthouse.

Judge Becker, concurring as to the courthouse custody issue and concurring in the judgment, expressed some serious bewilderment with McIntire and McClung. He noted that the result here undercut the flexibility which should be accorded to district courts to deal with problems of this nature and might discourage the courts from ordering the production of prisoners to testify.

Judge Atkins dissented in part, concluding that the magistrate's order was proper in every respect.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the flexibility which district courts have to tailor their orders in such a way as to insure that justice is done while, at the same time, fairly distributing the responsibility and cost between the state and federal governments. Because the court of appeals' decision conflicts with the prior decisions of this Court, and with those of other courts of appeals, the Court should grant review.

1. The court of appeals read McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 598 (1821) as precluding reliance upon the All Writs Act, 28 U.S.C. §1651, for an order in the nature of a mandamus against federal officials. But McIntire held only that a mandamus

could not issue because the circuit courts had not been vested by Congress with jurisdiction to decide the types of claims at issue in that case (i.e., the right to a land patent). In fact, the Court adverted to the availability of mandamus in a proper case, noting that

> [h]ad the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act [the predecessor of 28 U.S.C. §1651] would sanction the issuing of the writ for such a purpose.

11 U.S. [7 Cranch] at 506.

McClung v. Silliman, 19 U.S. [6 Wheat.] 598 (1821), the other case relied upon by Judge Gibbons (and the case which so troubled Judge Becker) likewise does not support the decision of the court of appeals. Although McClung is admittedly somewhat hard to follow, its essence is

the Court's conclusion that no authority could be found for the proposition that a state tribunal had jurisdiction to issue a writ of mandamus against a federal official; such authority certainly could not be lightly inferred when Congress had refused to delegate the power to the federal courts. Id. at 604. As the Court later had occasion to observe, "[T]he only question directly before the court [in McClung], was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 617 (1838).[4] As such,

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[4]Even if the court of appeals correctly interpreted McIntire and McClung, a great deal has changed since those decisions. The federal trial courts now have general federal question

FOOTNOTE CONTINUED ON NEXT PAGE

McClung is a case resting on the sovereign immunity of federal officials which protects them from litigation in state courts.

Contrary to the court of appeals' conclusion, this Court repeatedly has interpreted the All Writs Act to confer on the federal courts broad and flexible powers to aid in the exercise of their jurisdiction. See, e.g., United States v. New York Telephone Co., 434 U.S. 159, 172-173 (1977); Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942).

FOOTNOTE 4 CONTINUED

jurisdiction, 28 U.S.C. §1331, and the district courts have specific statutory authority to issue writs of mandamus to federal officers and employes, 28 U.S.C. §1361. If anything, McIntire and McClung today stand only for the proposition that the All Writs Act permits federal, but perhaps not state, courts to issue writs in the nature of mandamus against federal officials if the case otherwise is within the court's jurisdiction.

This flexibility is no better illustrated than by the Court's many decisions permitting resort to the All Writs Act to supply necessary procedural devices not recognized as traditional components of the writ of habeas corpus. See Harris v. Nelson, 394 U.S. 287 (1969) (All Writs Act permits district courts to issue discovery orders in habeas corpus proceeding despite absence of authorization for such orders in the habeas corpus statutes); United States v. Hayman, 342 U.S. 205 (1952) (All Writs Act authorizes district court to issue order for production of prisoner to testify at hearing on claim under 28 U.S.C. §2255); Price v. Johnston, 334 U.S. 266 (1948) (All Writs Act permits court of appeals to issue a writ ordering that a prisoner be produced in court to argue his appeal from denial of a writ of habeas corpus). So too here, the All Writs Act may supply the

necessary procedural device to accomplish the transfer of custody from state to federal officials despite the fact that the traditional writ of habeas corpus only may be directed to the custodian. See 28 U.S.C. § 2243.

In the final analysis, the court of appeals has too narrowly confined the district courts' ability to fashion procedural devices to meet the exigencies of the case at hand. The court's conclusion conflicts directly with this Court's determination that the federal courts have the authority when "appropriate" (although, perhaps, not strictly necessary), to utilize procedural devices "to achieve the ends of justice ...." Adams v. United States ex rel McCann, supra, 317 U.S., at 273. There is no question here that the district court, unlike the lower courts in McIntire and McClung, had jurisdiction over the case;

clearly its orders were in aid of that jurisdiction as contemplated by 28 U.S.C. § 1651. Accordingly, the court of appeals erred in applying a blanket rule that the orders directed to the marshal were without authority. Ibid. The importance of this issue to all state and local custodians of prisoners merits this Court's review.

2. As all members of the court of appeals panel correctly observed (App. 13a - 14a, 44a, 45a), the decision in this case conflicts with the decisions in four other circuits. In Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984), the court upheld a district court order requiring the marshal to transport a state prisoner to testify in federal court. The Fifth Circuit has approved an order precisely like the one at issue here; the state authorities were required to transport the prisoner to the county jail nearest

the federal courthouse and the marshal had the duty to produce the prisoner in court. Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977). In Ford v. Carballo, 557 F.2d 404 (7th Cir. 1977) the court held that the marshal can be ordered to reimburse state officials for the cost of transporting a state prisoner to federal court pursuant to a writ addressed both to the marshal and the state prison warden. See also Wiggens v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied sub nom. California Department of Corrections v. United States, No. 83-634 (Feb. 27, 1984) (upholding a district court order requiring state officials to bear the entire cost of producing a prisoner in state court, but holding that the allocation of responsibility for producing state prisoners between the marshal and state authorities rests

within the sound discretion of the district court).

The flurry of recent decisions noted above on the question of the district court's authority to order that federal and state officials share the task of producing state prisoners in federal court is a reflection of the increasing number of habeas corpus actions and prisoners' civil rights suits. The issue of who shall bear the responsibility for and cost of producing these prisoners in court is of tremendous importance to state corrections officials. The conflicting decisions of the courts of appeals and the seriousness of the issue merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1283

GARLAND, RICHARD

vs.

SULLIVAN, JOSEPH A., SHERIFF, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, COMMONWEALTH OF PENNSYLVANIA,
UNITED STATES MARSHALS SERVICE,
Appellant

(D.C. Civil No. 80-2350)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and BECKER, Circuit Judges and ATKINS, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District

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*Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

of Pennsylvania and was argued by counsel January 23, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 9, 1982, be, and the same is hereby as made final by its orders entered February 11, and February 17, and February 22, 1983, be, and the same is hereby affirmed insofar as it requires the Marshal of the District Court to take into custody while in the federal courthouse state prisoner witnesses whose presence is required for testimony in civil proceedings in the federal court but is reversed insofar as, without a finding of special security circumstances, it required the Marshal to transport those witnesses between the county jail and the federal courthouse. All the above in accordance with the opinion of this Court.

ATTEST

Clerk

June 27, 1984

Certified as a true copy and issued in lieu of a formal mandate on July 19, 1984.
Test:
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1283

RICHARD GARLAND

v.

JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF' SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE

United States Marshals Service,

Appellant

(D.C. Civil No. 80-2350

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: January 23, 1984
BEFORE: GIBBONS and BECKER, Circuit Judges and ATKINS, District Judge*

(Opinion Filed: June 27, 1984)

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*Hon. C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

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OPINION ANNOUNCING
THE JUDGMENT OF THE COURT

GIBBONS, Circuit Judge:

The United States Marshals Service, an intervenor, appeals from an order of a United States Magistrate in a pending civil action, denying the intervenors' motion for reconsideration of an order directing the United States Marshal for the Eastern District of Pennsylvania to transport a state prisoner witness from the nearest county jail to the United States Courthouse in Philadelphia and to maintain custody of that prisoner while he is in the federal courthouse. The underlying civil action is within the subject matter jurisdiction of the district court, and is assigned for trial

before a United States Magistrate by consent of the parties. 28 U.S.C. § 636(c)(1). The Marshals Service contends that the district court, and hance the United States Magistrate, lacked statutory authority to enter the order appealed from. The Bureau of Corrections, Commonwealth of Pennsylvania, the Sheriff of Philadelphia County, and the City of Philadelphia, which have also intervened, defend the order. We hold that the district court, and thus the magistrate, has statutory authority to direct the United States Marshal to maintain custody of a state prisoner witness in the federal courthouse while he is there in connection with judicial proceedings, but lacks such authority to direct the Marshal to transport that prisoner between the county jail and the federal courthouse.

I.

Appealability

This dispute, between the United States Marshals Service and the Pennsylvania corrections officials as to who must bear the expense of transporting and maintaining secure custody over state prisoners required as witnesses in civil proceedings in the federal courts, is entirely collateral to the underlying action. The Magistrate's order disposes of the dispute fully and finally. Review of final orders in cases tried by consent of the parties before United States Magistrates lies directly to this court.[1] 28 U.S.C. § 636(c)(3).

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[1] Siers v. Morrash, 700 F.2d 113 (3d Cir. 1983), does not hold otherwise. That case did not involve a case tried before a United States Magistrate by consent of the parties. 700 F.2d at 116 n.10, and the appeal was therefore brought under 28 U.S.C. § 1291, not under 28 U.S.C. § 636(c)(3).

Thus we have appellate jurisdiction. Story v. Robinson, 689 F.2d 1176, 1177 (3d Cir. 1982).

II.

The Merits

At issue in this appeal is the authority of a United States District Court to shift the burden of expense in responding to unquestionably lawful federal civil process from the Commonwealth of Pennsylvania to the United States Treasury. The Commonwealth understandably prefers that federal taxpayers bear that burden, and since the United States is often seen as the ultimate deep pocket target, that preference has a plausible appeal. But the United States has not conferred on the federal judiciary any authority to lay hands on its Treasury. To the contrary, the Constitution provides that

"[n]o Money shall be drawn from the Treasury, but in Consequence of appropriations made by Law . . . ." Art. I, Sec 9, cl. 7. Absent statutory authorization, what the Commonwealth proposes is a raid in its interest on the United States Treasury.

A.

Transportation

This court has dealt with the contention advanced on behalf of the Commonwealth, the County and the City in the recent past. In Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982), the Commonwealth and Allegheny County appealed, as intervenors, from a writ of habeas corpus ad testificandum directing that state prisoner witnesses be transported from state prisons to a county jail near the federal courthouse in Pittsburgh. The Commonwealth objected

to transporting the prisoners without reimbursement by the United States, and urged on us several statutes which might authorize the district court to qualify the writ by a reimbursement condition. The first statute relied upon was 28 U.S.C. § 569(b), which instructs the Marshals to "execute all lawful writs, process and orders executed under the authority of the United States . . . ." We held that this statute was not a separate source of judicial authority to issue writs, process and orders, but only a source of the Marshals' duty to execute them when they have been issued pursuant to some other source of authority. 689 F.2d at 1179. A second statute was 28 U.S.C. § 571, which authorizes the United States Marshal to act as disbursing officer for the United States Attorney and for federal court personnel. We held that this statute

conferred no authority to relieve state custodians of the financial burden of complying with federal process. 689 F.2d at 1179. A third statute relied on by the Commonwealth was 28 U.S.C. § 567(2), which provides that each United States Marshal shall be allowed "the expense of transporting prisoners. . . ." We held that this statute was no authority, at least absent some intergovernmental agreement, see 28 C.F.R. § 0.111(j)(1983), for relieving the Commonwealth of such expense. Id. Finally, the Commonwealth relied on 28 U.S.C. § 1651. We rejected the Commonwealth's contention that this statute required the grant of the motion to impose the entire cost of compliance with the writs of habeas corpus ad testificandum on someone other than the state custodian. 689 F.2d at 1180.

In the instant case neither in the district court nor before this court did the Commonwealth and its subdivisions rely upon section 1651 as authority for an order directed to the United States Marshal.[2] Technically, the question is open, for while Story v. Robinson rejected the contention that section 1651

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[2]The Magistrate relied on 28 U.S.C. § 569 which authorizes the Marshals to "attend any session of court . . ." when ordered by the district judge to do so, and to "execute all lawful writs . . . issued under the authority of the United States."

The Marshals Service has not fared well in the other circuits that have considered this issue. In Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977), the Fifth Circuit upheld a cost-sitting order by the district court. It held that the district court had the power to issue such a writ under 28 U.S.C. § 2241 and that the Marshal was obligated to obey under 28 U.S.C. § 569. The precedent was applied to an order allocating full responsibility to the Marshal in Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984). In Ford v. Carballo, 577 F.2d 404

FOOTNOTE CONTINUED ON NEXT PAGE

required an order that the cost of producing prisoner witnesses must be assumed by the Marshals Service, it did not decide whether the section nevertheless authorized such an order as a matter

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FOOTNOTE CONTINUED

(7th Cir. 1978), the Seventh Circuit held that under the All Writs Act, 28 U.S.C. § 1651, the district court abused its discretion when it failed to order the Marshals Service to reimburse a state for the cost of transporting and producing a plaintiff prisoner in a habeas proceeding. Finally, in Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied, 104 S.Ct. 1425, the Ninth Circuit held in dicta that "a district court judge has the discretion to allocate the costs of compliance with a writ ad testificandum in any number of combinations . . . [including] the clearly preferable sharing of costs approved in Ballard and Story as well as imposing full costs on the United States, see 28 U.S.C. §567(2). 569(b). . ." The court disagreed, however, with Ballard's holding that the Marshals Service could be ordered to reimburse the state for the costs of transportation. It also disapproved of Ford v. Carballo's use of the All Writs Act instead of the separate grant of habeas power contained in 28 U.S.C. § 2241.

of discretion. No party has briefed that question, but since such a construction of section [65] might arguably justify the order appealed from, we address it.

A construction of the All Writs Act as a grant of authority to transfer to the United States Treasury the expense of compliance with witness process is unsupportable. None of the authorities construing section 1651 interpret it as a grant of authority for the issuance of an order compelling a non-party Executive branch officer to satisfy the obligation of state custodians to respond to witness process. United States v. New York Telephone Co., 434 U.S. 159 (1977), on which the Commonwealth relied in Story v. Robinson, supra. involves the authority of the district court to direct process to non-parties who are so situated that their cooperation is essential to the exercise of its

jurisdiction otherwise attaching. The Marshal clearly is not so situated. The only cooperation necessary to the exercise of the district court's jurisdiction over pending civil or criminal cases is that of the custodian of needed witnesses.[3]

In McIntire v. Wood, 11 U.S. [7 Cranch] 502 (1813), the Court held that section 14 of the Judiciary Act of 1789, from which section 1651(a) is derived, was not a source of substantive authority to mandamus federal executive branch officers. Cf. McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821) (state court cannot mandamus federal officer).

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[3]Similarly, Application of the United States of America, 610 F.2d 1148 (3d Cir. 1979), which upheld an order directing telephone companies to cooperate in tracing certain telephone calls, is distinguishable from the case before us because the cooperation of the companies was essential to the execution of the tracing order.

Compare Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (1972), codified at 28 U.S.C. § 1361 (1976) ("Action to compel an officer of the United States to perform his duty"). Since the Marshals are not custodians, they are nct appropriate respondents to writs of habeas corpus. Orders directing them to assume the burden of compliance are therefore in the nature of mandamus. Thus the definitive construction of the All Writs Act in McIntire v. Wood precludes reliance on that statute.

Any other interpretation of sectior 1651 would permit district courts to impose the expenses of litigation upon the Treasury of the United States whenever that seemed to the court to be a good idea. Both common sense and appropriate concern for separation of powers caution against such an arrogation of judicial power. Certainly

section 1651 authorizes writs in aid of the district court's jurisdiction otherwise obtaining. Thus, as we held in Story v. Robinson, it authorizes writs of habeas corpus ad testificandum directed to custodians. But it is a long leap from authority to compel custodians to produce witnesses necessary for the exercise of jurisdiction, to authority to compel non-custodians to bear the expense of that production simply because they have access to a deeper pocket.

B.

Courthouse Security

Custody of state prisoners in the United States Courthouse presents a separate issue, because courthouse security is involved. A federal statute provides that "[t]he United States Marshal of each district is the marshal

of the district court. . .and may, in the discretion of the respective courts, be required to attend any session of court." 28 U.S.C. § 569(a). Addressing that provision, we observed in Story v. Robinson:

> This statute quite clearly authorizes the district court to require the attendance of the Marshal at any judicial proceeding, including any proceeding at which the testimony of a state prisoner may be required. It seems plain, then, that the court has authority to direct the marshal to take prisoners into custody during the time their attendance at court is required.

689 F.2d at 1180. The Marshals Service acknowledges that this section of the statute makes the Marshals responsible for courthouse security, and that funds are appropriated for that purpose, but urges that absent some finding of a security risk, it should not be construed to relieve the state custodians of the duty to produce their prisoner witnesses and maintain them in secure custody.

We hold that section 569(a) authorizes federal trial courts,[4] in the interest of security and flexibility, to require the Marshal of the district to take custody of state prisoner witnesses while they are in a federal courthouse for purposes of testimony. Requiring an individualized "special security risk" finding would be completely impractical. The development of a record for such findings is beyond the capabilities of the litigants for whose lawsuits the prisoner witnesses are needed. Because of the critical need for courtroom security this case presents one of those rare instances in which the trial courts must be recognized as having virtually unreviewable discretion. Nor is the alternative of depen-

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[4]The Marshals Service does not contend that Magistrates have less authority under section 569(a) than do district judges.

ding on state corrections officers for the maintenance of security within federal courthouses a viable alternative. Since 1789 the United States has depended upon its own marshals for the security of its own court facilities, and few if any federal judges would be comfortable with any other arrangement.

The provision of the order requiring that the Marshal of the District Court transport prisoners between the county jail and the federal courthouse, however, presents a distinctly different issue. In Story v. Robinson we reserved the question "whether section 569(a) provides authority for a direction, in the interest of courthouse security, that prisoner witnesses be taken into custody at a point outside the courthouse." 689 F.2d at 1180. We did not intend to suggest that federal trial courts had

unlimited discretion to enter such orders. Obviously the security problem outside the courthouse is of an entirely different order of magnitude than that within. The presumption should be that there is no federal court security interest until state prisoners are delivered to the custody of the Marshal of the district at the federal courthouse Situations obviously can be imagined in which that presumption may be overcome; particularly dangerous or threatening prisoners, for example, or perhaps prisoner witnesses whose own safety may be at risk. But those situations are likely to be the exception. Thus we hold that unless a federal trial court makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal

courthouse, section 569(a) does not authorize such an order. There is no other authority for such an order.

III.

Conclusion

The order appealed from will be affirmed insofar as it requires the Marshal of the District Court to take into custody while in the federal courthouse state prisoner witnesses whose presence is required for testimony in civil proceedings in the federal court, but reversed insofar as, without a finding of special security circumstances, it required the Marshal to transport those witnesses between the county jail and the federal courthouse.

BECKER, Circuit Judge, concurring part[1] and concurring in the judgment.

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[1]I join only in Parts I and II.B. of Judge Gibbon's opinion.

The opinion announcing the judgment of the court proceeds along the following syllogism. A writ of habeas corpus ad testificandum requires the custodian to produce the prisoner at a trial. Since the magistrate in this case ordered federal marshals to deliver a prisoner of Pennsylvania to the federal courthouse, the order appealed from cannot be a writ of habeas corpus and testificandum but must instead be a writ in the nature of mandamus directed at the Marshal Service. But, continues the syllogism, under McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), and McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), the All Writs Act does not authorize federal court to issue writs of mandamus against federal executive branch, and since neither 28 U.S.C. § 569(a) nor 28 U.S.C. § 569(b) (nor any other arguable provision) provides an

alternative source of authorization, the magistrate commmitted an error of law when he directed that the Marshals Service share responsibility for transporting state prisoners to federal court pursuant to a writ of habeas corpus ad testificandum.

With one exception,[2] I find each of the critical steps in this syllogism to be questionable. Moreover, having in mind the role of the Marshal as the executive arm of the court and the need to accord flexibility to trial judges if the judicial system is to function fairly, I believe that the consequence of the historic approach taken by Judge Gibbons' opinion is unfortunate. Ultimately, I cannot deny the analytic force of his opinion, and I

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[2]I agree that section 569(a) and 569(b) do not authorize the magistrate's directive in this case.

am thus constrained to concur in the judgment. Given the institutional importance of today's decision and the circuit split it creates, however, I believe it important to probe the weaknesses of the syllogism implicity relied upon, and to explain the problems of judicial administration likely to result from the failure to adapt the precedents of antiquity to the needs of a modern society, hence this separate opinion.

I. Analytic Problems

A. The Rigid View of Habeas Corpus Ad Testificandum

It is hornbook law that "[w]hen served with a writ of habeas corpus ad testificandum calling for the production as a witness of one lawfully restrained of his liberty, the sheriff, jailer, or other custodian of such person is bound

to bring him into court to give his testimony. . . ." 97 C.J.S. Witnesses §30 c (1957). It is similarly the ancient learning that "A prisoner produced in response to a writ of habeas corpus ad testificandum is still in custody and the court or commissioner issuing the writ has no power to authorize the custodian to suffer his prisoner to go at large pending the proceedings in which he is called to testify, or to take him from the custody of one officer and put him in another." Id. There is no provision anywhere in traditional authority that permits modifications of this writ to allow custody to be transferred to federal officials before the courthouse is reached. Thus, this segment of Judge Gibbons' syllogism is probably correct.

The rigidity with which habeas corpus ad testificandum is viewed,

however, rests in some tension with the flexible character of the All Writs Act, which has been held in three post-war cases to authorize the issuance of writs not precisely comporting than those of tradition. In Price v. Johnston, 334 U.S. 266, 282 (1948), Harris v. Nelson, 394 U.S. 286, 299 (1969), and United States v. New York Telephone Co., 434 U.S. 159, 171 (1977), the Court has repeatedly interpreted the All Writs Act to be a "legislatively approved source of procedural instruments designed to achieve the rational ends of the law." Moreover, as the Supreme Court stated in Price, "since 'law' is not a static concept, but expands and develops as new problems arise, . . . the forms of the habeas corpus writ authorized by [section 1651] are not only those recognized in this country in 1789, when the original Judiciary Act containing the substance

of this section came into existence. . . . Rather, it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" 334 U.S. at 282. This expansive language must give pause to any court seeking to circumscribe the discretion of a district court that seeks to fashion equitable procedures for assuring the presence of witnesses in proceedings before it.

More than the mere language of the cited cases might suggest the All Writs Act to provide a source for the directive issued by the magistrate in this case. In Price the issue was whether a federal appeals court had power to permit a state prisoner to come forward to argue his own appeal. Despite the absence of any traditional writ or express statutory provision authorizing release of a prisoner on these grounds, the Supreme Court held that section 1651

gave the appeals court such power. In Harris, a case much like this one in that the district court perceived a need for greater fact finding than other statutes would have allowed, the Supreme Court held that, despite the absence of specific statutory authority, the district court could issue a discovery order in connection with the habeas corpus proceeding before it. In New York Telephone, the Supreme Court affirmed an order of the district court directing a telephone operating company to assist the FBI in installing pen registers. After summarizing the case law noted above, the Supreme Court stated there that the All Writs Act empowers federal courts to issue orders to "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court

order or the proper administration of justice . . . and even encompasses those who have not taken any affirmative action to hinder justice." 434 U.S. at 174.

I suppose, however, that there is a difference between the creation of new writs to satisfy new needs and the expansion or modification of existing writs. With the latter, the traditional forms and doctrines may be said to express the limits of the writ. To rephrase the matter in statutory pariance. 28 U.S.C. § 2241(c)(5) (1982), which gives federal courts authority to issue writs of habeas corpus ad testificandum, may preclude reliance on 28 U.S.C. § 1651 (1982)(the All Writs Act in modern garb) to create processes that mimic section 2241 writs in most of their features but which speak with their own voice on several critical issues. Thus, I cannot quarrel too

much with a conclusion that the magistrate did not (and statutorily likely could not) issue a writ under 28 U.S.C. § 1651 directing the Marshals Service to share responsibility for transporting a state prisoner to federal court so that he might testify in civil proceedings. Instead, the magistrate issued a traditional writ of habeas corpus ad testificandum, and tagged on a writ, arguably in the nature of mandamus, directing the marshals to share responsibility for transport. The question then becomes, of course, whether the magistrate had authority to issue this supplemental writ.

B. The Ways of Denying Authority

The opinion announcing the judgment of the court relies on the hoary cases of McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), and McClung v.

Silliman, 19 U.S. (6 Wheat.) 598 (1821), to reach the conclusion that the All Writs Act, 28 U.S.C. § 1651 (1976), does not authorize a writ of mandamus against a federal executive officer. While I ultimately agree with the opinion of Judge Gibbons on this point, I am not without serious doubts.

Standing alone, I do not think the cryptic opinion in McIntire v. Wood could support the result reached today. In that case, a person claiming to own land by virtue of a federal statute brought suit in federal court in order that the court might direct a land officer to perform various acts apparently needed to perfect title (or to bring suit to perfect title). There being no "arising under" jurisdiction as there is in modern federal practice, the Supreme Court held that the 11th Section of the Judiciary Act of 1789 did not permit the

suit to be brought in federal court. Generally put, that section vested the then-circuit courts with jurisdiction only over certain types of diversity and alienage cases, and cases in which the United States was the plaintiff or petitioner. Were we writing on a clean slate, we would say that the only comment McIntire made with respect to the All Writs Act was that it did not in and of itself create federal jurisdiction; though Congress might have granted jurisdiction to the federal courts in cases wherein performance by some federal officer was a precondition to enforcement of some federal entitlement, it had not done so in the All Writs Act.

It is only because of McClung v. Silliman and because of that case's interpretation of McIntire that I feel constrained to adhere to the judgment announced today by Judge Gibbons. In

that case, the same litigant who had not been permitted to sue in federal court in McIntire sued in state court and asked it to issue a writ of mandamus to the recalcitrant federal land officer. The state court believed it had the power to issue such a writ, but, on the merits, declined to do so. Because of this factual background, it would seem that the issue before the Supreme Court was essentially one of federalism: whether the state court had the power to issue orders to a federal executive official.

For reasons that are lost to antiquity the Supreme Court in McClung determined whether a federal court could issue such a writ in cases (such as the one before it) where diversity of citizenship existed. Unaided by consultation of McClung, I would have thought that a federal court could issue

such a writ under those circumstances; as I read McIntire, the problem was an absence of statutory jurisidiction, not some limitation on remedial powers. In McClung, however, the Supreme Court spoke to the contrary and stated (so far as I can discern) that, because there was no jurisdiction, a federal court of original jurisdiction could not issue a writ of mandamus against a federal official, even in cases where the parties were of diverse citizenship. Why there would be no jurisdiction in such a case is a mystery that perhaps only those deeply schooled in the mindset of that era could solve.[3]

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[3]I resist the temptation to interpret McClung against its historic background, i.e., the reluctance of the early Supreme Court to asset its powers against a hostile executive. Times have of course changed, and now the Mandamus Act, 28 U.S.C. §1361, has formalized the power of federal courts to mandamus inferior federal officers.

My bewilderment does not permit me to disregard what the Supreme Court has written, however. Thus, so long as I accept the assertion that the magistrate issued a writ of mandamus against the Marshals Service, and the notion that a marshal, like the land officer in McClung, is a member of the federal executive branch, then I must resign myself to the decision reached by Judge Gibbons.

C. The Status of the Marshals

Generally speaking, the United States Marshals serve as the executive arm of the federal judiciary and, since the Judiciary Act of 1789, have been obligated to execute all lawful "precepts" directed to them under the authority of the United States. As the Fifth and Eleventh Circuits have observed, "The raison d'etre if the

Marshal Service is to service the federal forum in civil as well as criminal litigation." Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984)(per curiam); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977). And from what I have observed during my years on the district bench, the Marshals Service performs numerous tasks for members of the judiciary. Finally, this court has declared that "[i]n discharging his duties as a Marshal he acts concurrently as an officer of the federal judiciary and as an executive officer." United States v. Krapf, 285 F.2d 647, 649 (3d Cir. 1961).

I conclude, however, that these factors do not take the Marshals Service out of the executive branch of our government. The President appoints the United States Marshal for each judicial district, 28 U.S.C. § 561(a); and the

Attorney General supervises and directs the United States marshals in their performance of public duties, 28 U.S.C. § 569(c)(1976). Thus, while there is plainly a special relationship between the Marshals Service and the federal judiciary, the marshals formally remain part of the executive branch of our government. While I would feel considerably more comfortable with this result, were I able to discern the reasoning of McIntire and McClung in their apparent restrictions on federal mandamus power and thus to consider whether those reasons justified a limit on mandamus against federal marshals, on balance I agree with Judge Gibbons' conclusion that federal marshals are the beneficiaries of whatever limits there may be under 28 U.S.C. § 1651 on the issuance of writs of mandamus against federal executive officials.

II. The Need For Flexibility

My acceptance of the rigid historicism of the opinion announcing the judgment of the court is also hindered by my belief that, from a perspective of judicial administration, the flexibility and creativity exhibited by the magistrate in mediating the vexing financial problems of Pennsylvania and the United States is precisely what we should be encouraging. If the dead hand of precedent did not cabin my freedom of action, I would applaud the actions of the magistrate here.

It is important to explain why today's holding may hamper the ability of the federal courts to find facts accurately, particularly in prisoners' rights suits under 42 U.S.C. § 1983, which, for obvious reasons, frequently require invocation of the otherwise unusual writ of habeas corpus ad

testificandum. Cf. Harris v. Nelson, 394 U.S. 286 (1969)(expanding fact finding capacity of federal courts via section 1651 in habeas corpus proceeding brought by prisoner). Many such suits involve baseless claims and in many cases "ad testificandums" will be unnecessary. But where a district court or magistrate determines that the testimony of a state prisoner actually would assist a court or jury in its fact finding capacity, it should not be deterred from obtaining the prisoner because the state is unable to pay the full costs of witness production and because the similarly strapped Marshals Service is itself hard pressed to shoulder any such burden.

It may be said, of course, that the state assumes the costs of producing those it has chosen to incarcerate when federal authorities determine that temporary release of the prisoner is required

in order to vindicate federal rights. This court has recognized, however, that because states have compelling interests in incarcerating dangerous persons, the federal courts should consider the costs of production on a custodian before issuing writs of habeas corpus ad testificandum. See Jerry v. Franciso, 632 F.2d 252 (3d Cir. 1980)(per curiam). Yet, given (1) the requirement of Jerry v. Franciso that courts consider the costs to the state before issuing an ad testificandum; (2) the principle that issuance of an ad testificandum writ lies in the discretion of the trial court; and (3) financial realities, we fear that, faced with a holding that the court cannot exercise its discretion to order the Marshals and the state to share the costs of transportation, there may be cases in which the district courts may be impelled to exercise their discretion

to deny ad testificandum writs when a state is short of funds. Such denials will, at least in some instances, impair the vindication of civil rights.

III. Solutions

Several methods exist whereby the concerns expressed in parts I and II of this opinion can be treated and the difficulties I help create today can be ameliorated. The first would be for me to change my mind. I will confess to have wavered many times in the course of reviewing this appeal. Ultimately, however I cannot escape McClung, a decision of the Supreme Court, which no matter how antiquated, I am not free to overrule. The Supreme Court, by contrast, has far greater freedom and greater authority in interpreting its cases than do courts of appeal; it also may find that, because statutes can

adapt to fit the needs of changing times, the All Writs Act now permits what, in the time of McIntire and McClung it did not.[4] With a split in the circuits now existing, there is now all the more reason for Supreme Court review in this area.[5] Finally, of course, legislative action may provide for greater. flexibility than exists by virtue of our decision today. Congress may conclude that our interpretations of its prior commands has been erroneous or decide to issue new commands in light of changed circumstances. While I did not presume to tell Congress what result to

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[4]Alternatively, the Supreme Court may find that my interpretation of McClung is simply incorrect.

[5]Justice Rehnquist has already suggested the question before us today to be worthy of Supreme Court review. See California Department of Corrections v. United States, 104 S.Ct. 1425 (1984) (Rehnquist, J., dissenting from denial of certiorari).

reach, I do suggest that it is a problem, among any, worthy of its consideration.

ATKINS, District Judge, concurring in part and dissenting in part.

I concur in Part I and Part II.B. of Judge Gibbons' opinion. However, because I agree with the decisions of the Fifth and Eleventh Circuits in Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977) and Ford v. Allen, 728, F.2d 1369 (11th Cir. 1984) (per curiam), and with the Ninth Circuit in Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied, 104 S.Ct. 1425 (1984), I respectfully dissent from the judgment.

A TRUE COPY

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND : CIVIL ACTION

v.

SHERIFF SULLIVAN, ET AL. : NO. 80-2350

MEMORANDUM AND ORDER

WILLIAM F. HALL, JR. FEBRUARY 10, 1983
UNITED STATES MAGISTRATE

On December 8, 1982 in response to the plaintiff's petition, I issued writs of habeas corpus ad testificandum ordering the custodians of the plaintiff and four of his proposed witnesses, all of whom are inmates in various state prisons here in Pennsylvania, to produce them for the trial of the plaintiff's case. The writs directed that the custodians were to transport the inmates from their present institutions to the county prison nearest to this courthouse and that the United States Marshal was

then to transport them from the county prison to the courthouse and maintain custody of them while they were in the courthouse for the trial and then transport them to the county prison when their appearance before the court was completed.

After the writs were issued the United States Marshals Service (the Marshal) moved to intervene and for reconsideration of my orders. I granted the motion to intervene and heard oral argument on the motion for reconsideration on January 19, 1983.

The Marshal objects to the order, insofar as it imposes a duty on him, on the grounds that:

1. Historically a writ has always been directed to the custodian of the prisoner sought, thus encumbering that custodian with the sole responsibility of producing his prisoner before

the tribunal seeking him and maintaining custody over him until he has completed his testimony;

2. The past practices of the Eastern District of Pennsylvania with regard to the production of state prisoners before the district court in their private civil rights actions have never heretofor involved any participation or support of the Marshal;

3. There is no statutory authority which allows the Marshal to expend manpower or monies in support of producing state prisoners to federal court in private civil rights actions.

This Circuit recently, in Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982), considered the propriety of the Marshal's participation in transporting and maintaining custody of state prisoners in a civil rights action. In Story, the court affirmed an order imposing

duties upon the Marshal identical to those required by the orders in this case, insofar as it concerns his responsibility for the custody of state prisoners while in the courthouse. The court held that 28 U.S.C. §569(a), prescribing the duties of the Marshal generally:

> [Q]uite clearly authorizes the district court to require the attendance of the Marshal at any judicial proceeding, including any proceeding at which the testimony of a state prisoner may be required. It seems plain, then, that the court has authority to direct the Marshal to take prisoner witnesses into custody during the time their attendance at court is required.

At p. 1180. However, because the Marshal did not file a cross-appeal, the court did not decide whether Section 569(a) authorizes an order requiring the Marshal to take a prisoner witness into custody outside the courthouse. I conclude, therefore, that so much of the order as directs the Marshal to take Custody of the plaintiff and his witnesses during

the time of their attendance in court in this matter is clearly authorized by Section 569(a), and I will not amend the order in that respect. However, further review of that part of the order which requires the Marshal to take custody of the prisoners at a place outside of the courthouse is necessary.

While the historical practice in the Easaern District of Pennsylvania and federal courts generally may warrant consideration, neither history nor the past practices in this District, as they relate to the production of state prisoners in federal courts, in my view, constitute a legal prohibition against apportioning the responsibility for producing the plaintiff and his witnesses between the Commonwealth of Pennsylvania and the Marshal. Although couched in terms of historical practice, the Marshal's objections to his participation

in this process do, however, raise the question of whether there is legal authority for the court to order his participation in the transportation of state prisoners to the full extent required here.

In the exercise of the court's undisputed authority to issue writs of habeas corpus ad testificandum,[1] the order in question directs the Commonwealth to surrender custody of the plaintiff and his witnesses to federal authorities for the limited purpose of their court appearance. In the exercise of that general authority I have directed the Marshal to execute an order upon him ancillary to the command of the writ of habeas corpus ad testificandum and necessary for the production of the

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[1] 28 U.S.C. §2241(c)(5); Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Story v. Robinson, 689 F.2d 1176, 1178 (3d Cir. 1982).

plaintiff and his witnesses in this court. The authority to impose these responsibilities upon the Marshal, ancillary to the production of these prisoners by the Commonwealth pursuant to the writ, is clearly provided for by 28 U.S.C. § 569(b),[2] which provides that United States Marshals shall execute all lawful writs and orders issued under the authority of the United States. Clearly the plain meaning of the language of Section 569(b) supports that conclusion, and other courts have reached the same result in the face of similar objections raised by the Marshal. Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977); Story v. Robinson, 531 F.Supp.

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[2] Subsection (b) provides:

United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and government of the Canal Zone, and command all necessary assistance to execute their duties.

627 (W.D. Pa. 1982)(Chief Judge Weber). Indeed, in Ballard v. Spradley, in concluding that the Marshal could be ordered to transport state prisoners, as witnesses in civil actions, from a local jail to the courthouse, the court upheld the order as being authorized by Section 569(b), and observed that the raison d'etre of the Marshals Service is to serve the federal forum in civil as well as criminal litigation. At p. 480. Similarly, in United States ex rel. Brown v. Malcolm, 350 F.Supp. 496, 498 (E.D.N.Y. 1972) the court concluded that it was the mandatory duty of the Marshal, pursuant to Section 569(b), to execute a writ of habeas corpus ad prosequendum issued by the District Court of Louisiana ordering New York State authorities to surrender a state prisoner to The Marshal who received temporary custody of him so that he could be brought by the Marshal

to Louisiana for sentencing and then returned to New York. In Ford v. Carballo, 577 F.2d 404 (1977) the Seventh Circuit also found authority in Section 569(b) for a federal district court's issuance of a writ of habeas corpus ad testificandum directing both the Marshal and the Warden of a state prison to produce a state prisoner for a federal civil proceeding. Ultimately at issue was the question of whether state authorities should be reimbursed for part of their expenditures insofar as the Marshal had failed to cooperate in the production of the prisoner. The court noted that the Marshal did not have the discretion not to participate in producing the prisoner, in spite of the pendency of his motion to modify the writ. The court concluded that the fact that a controversy may have existed over who should actually transport and suffer

the expense of producing the prisoner had no effect on the existing writ and did not authorize the Marshal to independently disregard a direct order of the court. At p. 407. Based on the foregoing, I conclude that legal authority exists for the order insofar as it directs that the Marshal take custody of prisoner witnesses at a point outside the courthouse.

In objecting to the order, the Marshal also argues that it cannot undertake the required transportation of state prisoners because there is no legal authority for it to make the necessary expenditure of funds. I do not agree with that contention because the authority for this expenditure is provided by 28 U.S.C. §567 which provides that, under regulations prescribed by the Attorney General, each United States Marshal shall be allowed the expense of transporting

prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards. The United States Marshals are also authorized to pay their own travel and per diem allowances and that of their deputies and clerical assistants. 28 U.S.C. §571. In addition, authority for the expenditures in question is provided by 28 C.F.R. §0.111(b), which numbers among the authorized activities of the Marshal the execution of lawful writs and court orders pursuant to Section 569(b). See Ballard v. Spradley, supra, at 481. I conclude, therefore, that authority exists for the Marshal to make any expenditures which may be necessitated by his execution of the order.

Because, as the Marshal contends, the order appears to be at variance with the prior practice in this court, an explanation is in order, beyond the

consideration of legal authority. In his opinion in Story v. Robinson, 531 F.Supp. 627 (1982), Chief Judge Weber observed that during the past decade federal courts have experienced a dramatic increase in prisoner civil rights case filings, in many of which cases the prisoners are granted leave to proceed in forma pauperis. He noted that as the volume and costs of such litigation have increased, placing greater burdens on limited judicial resources, there has been a growing reluctance by governmental agencies to assume responsibility for providing services necessary to administer justice efficiently. After discussing the propriety of alternatives to the actual production of prisoners in court as witnesses in their civil rights actions, he concluded that where their appearance in nevertheless necessary, a fair and equitable result

would be achieved by the allocation between state and federal authorities of the responsibility for the costs associated with the execution of a writ of habeas corpus ad testificandum. These considerations, as well as circumstances peculiar to this case, led to my issuance of an order which apportioned the responsibilities for producing the plaintiff and his witnesses, even though my doing so may be a departure from prior practice in this court.

In this case the plaintiff is an inmate at the State Correctional Institution at Huntingdon. One of the witnesses to be produced is an inmate at the State Correctional Institution at Rockview, another one is at the State Correctional Institution at Dallas, and another is an inmate at the Holmesburg Prison in Philadelphia. The financial burden imposed upon the Commonwealth by the requirement

that it transport the prisoners from and to Huntingdon, Rockview and Dallas, all considerable distances from Philadelphia, will be significant, but is justified when the interest of the plaintiff in being present at the trial with his witnesses is weighed against the interest of the Commonwealth in maintaining them in confinement, as I explained in the memorandum accompanying the orders. However, an equitable and reasonable limitation of the costs incurred by the Commonwealth will be accomplished by having it transport the prisoners from these various distant institutions to the central location of the Philadelphia Detention Center[3] which is relatively

---

[3]The Deputy Attorney General for the Commonwealth has advised the court that the Philadelphia Detention Center has been designated as the county jail nearest the courthouse to which the prisoners will be transported.

close to this courthouse. It is also equitable to apportion to the Marshal the responsibility for the transportation of the prisoners between the Philadelphia Detention Center and the courthouse, particularly given the practice of the Marshal of making frequent trips to and from that facility. Those trips are made by the Marshal because the Philadelphia Detention Center also serves as a facility where federal prisoners are frequently housed during their trials in this court, pursuant to an agreement between the Marshal and authorities of that institution.

I have further considered alternatives to the transportation of the inmates for a jury trial in this court, such as those enumerated by Chief Judge Weber in Story v. Robinson, at

pages 629, 630, as means of reducing the administrative costs in the adjudication of this matter while maintaining the highest standards of fairness and impartiality for the litigants, and as constituting less burdensome methods for obtaining the prisoners' testimony. In exploring these alternatives I was greatly aided by the General Counsel for the Marshal and by the Deputy Attorney General of the Commonwealth at the oral argument on the Marshal's motion and thereafter. Their sincere efforts facilitated the consideration of other procedures for obtaining the prisoners' testimony, none of which, however, is without prejudice to the interests of either the litigants, the Commonwealth of Pennsylvania, or the Marshal, or necessarily less burdensome than the means selected. Accordingly, with the exception of the order as it relates to

the prisoner at Holmesburg Prison, Larry Harris, the Marshal's motion for reconsideration is denied.

Larry Harris, who was an eyewitness to the acts complained of by the plaintiff, has apparently previously testified to these events during the plaintiff's trial on criminal charges which resulted in his being in the custody of the defendants. Counsel for the defendants contend that the transportation of prisoner Harris to court presents an unusual security risk in that on one occasion he "has already escaped from Holmesburg and was chased all the way to Center City by one of the prison guards."[4] Accepting counsel's

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[4]P.2, n.1 defendant's Memorandum in Opposition to plaintiff's Motion for Reconsideration of the court's order dated December 8, 1982.

The plaintiff's motion objected to the court's limitation on the number of witnesses ordered to be produced. The plaintiff's motion will be addressed in a subsequent memorandum and order.

assessment of the security risk as accurate, I considered alternative means of presenting the testimony of Mr. Harris, including the use of that portion of the trial transcript which contains his testimony about the incidents in question. Acting in the interest of her client, counsel has rejected that proposal as an acceptable alternative. In devising a solution to the problem of obtaining the testimony of Mr. Harris without prejudice to the litigants, I recognize the importance of his testimony to the plaintiff's attempt to prove allegations raising serious constitutional claims, and the difficulties in the presentation of his case which the plaintiff faces as an indigent prisoner, proceeding pro se. For these reasons I conclude that it is appropriate that the deposition of Larry Harris be taken at Holmesburg Prison by the

plaintiff's advisory counsel at the defendant's expense. Haymes v. Smith, 73 F.R.D. 572, 574-575 (W.D.N.Y. 1976).[5]

An implementing order is attached hereto.

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[5]As a further clarification of the matter, my previous order was not intended to require that Larry Harris be transferred to the Philadelphia Detention Center. He may remain housed at Holmesburg Prison where his deposition is to be taken.

IN THE UNITED SSTATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND : CIVIL ACTION

v.

SHERIFF SULLIVAN, ET AL. : NO. 80-2350

O R D E R

AND NOW, this day of February, 1983, the Motion of the United States Marshals Service for reconsideration of the court's orders of December 8, 1982 is DENIED, except with regard to the order of December 8, 1982 directing the production of Larry Harris, an inmate at Holmesburg Prison, which order is hereby VACATED in accordance with the attached memorandum.

BY THE COURT:

WILLIAM F. HALL, JR.
UNITED STATES MAGISTRATE

(2)

No. 84-489

Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1984

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing an order of the magistrate requiring the United States Marshals Service rather than the State to transport state prisoners to the federal courthouse in connection with an action brought by one of the state prisoners against county officials under 42 U.S.C. 1983.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-489

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-45a) is reported at 737 F.2d 1283. The opinion of the magistrate (Pet. App. 46a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on June 27, 1984. The petition for a writ of certiorari was filed on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action began when a state prison inmate, Richard Garland, brought suit in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. 1983 against various Philadelphia County officials who

allegedly violated his civil rights by beating and harassing him. The district court assigned the proceeding to a magistrate, who issued a writ of habeas corpus ad testificandum for the production at trial of Garland and four other state prisoners identified as proposed witnesses by plaintiff. The writ was addressed to the state custodians of these prisoners and to the United States Marshal; it required that the state prison officials transport the five state inmates from their institutions of confinement to the county jail nearest the federal courthouse in Philadelphia and that the United States Marshal transport the inmates from the county jail to the federal court and maintain custody of them during the trial. Pet. 5.

The Marshal intervened and moved for reconsideration of that portion of the magistrate's order that directed him to transport the state prisoners from the county jail to the federal courthouse and guard them during trial. The magistrate denied the motion (Pet. App. 46a-65a). The magistrate acknowledged that his order was contrary to the historical practice in the Eastern District of Pennsylvania regarding the responsibility of the Marshal for the transportation of state prisoners in connection with private civil rights actions (*id.* at 48a, 50a-51a, 56a). Nevertheless, the magistrate found that he had legal authority, in issuing a writ of habeas corpus ad testificandum, to require the Marshal to take custody over state prisoners outside the federal courthouse and to transport them to court (*id.* at 51a-62a).

2. On the Marshal's appeal from the denial of reconsideration,[1] the court of appeals reversed in part and affirmed

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[1]Because the case had been referred to the magistrate for trial by the consent of the parties, appellate review lay directly in the court of appeals rather than in the district court. See 28 U.S.C. 636(c)(3). Since the magistrate's order to the United States Marshal was collateral to the merits of the underlying civil rights action and fully and finally disposed

in part (Pet. App. 4a-45a). Relying on its earlier decision in *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982), the court of appeals held that district courts, and therefore magistrates, have no statutory authority generally to require the Marshal to transport state prisoners from state or county facilities to the federal courthouse. It also held that, as part of his responsibility for courthouse security, the Marshal could be ordered to take custody over state prisoners while they are in federal court. Finally, the court of appeals held that, incident to that security responsibility, the Marshal could be directed to take custody of state prisoners outside the federal courthouse and transport them to court if the trial judge "makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal courthouse" (Pet. App. 22a-23a). Since there was no general statutory authority to require the Marshal to transport state prisoners, and since the magistrate had made no finding of special security circumstances in this case, the court of appeals reversed the magistrate's order insofar as it obligated the Marshal to assume custody of the state prisoners outside the courthouse and transport them to court.

ARGUMENT

In our view, the magistrate in this case erred in requiring the United States Marshal to transport the state prisoners to the federal courthouse.[2] As the court of appeals recognized (Pet. App. 9a-10a, 15a, 17a-18a), the State is simply

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of the issue concerning transportation of the state prisoners, the court of appeals held that it had jurisdiction over the appeal pursuant to the collateral order doctrine (Pet. App. 8a-9a).

[2]In defending the magistrate's order, petitioner fails to make clear whether it contends that the magistrate was required to direct the Marshal to transport the state prisoners (see *Story* v. *Robinson*, 689 F.2d at 1177, 1178, 1181) or that the magistrate had discretion to do so and did not abuse his discretion in the circumstances of this case.

attempting to shift from itself to the "deep pocket" of the United States treasury the expense of producing state prisoners to testify in court. We see no reason why the federal government should be forced to bear the cost of transporting state prisoners in connection with a lawsuit by a state prisoner against county officials for acts done under color of state law.[3]

This Court recently denied review of the identical issue that petitioner raises. See *Wiggins* v. *County of Alameda*, 717 F.2d 466 (9th Cir. 1983), cert. denied *sub nom. California Department of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984).[4] As we now discuss, no developments subsequent to that denial of certiorari call for a different result in this case.[5]

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[3]Indeed, Garland's lawsuit could equally well have been filed in state court (see *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980)), in which event it would be frivolous to argue that the United States had any obligation to participate in transporting state prisoners. The fact that Congress has provided a forum for the resolution of disputes under 42 U.S.C. 1983 should hardly subject the United States to the duty of assisting the State in transporting state prisoners in connection with a lawsuit to which the federal government is not a party.

[4]A copy of our brief in opposition in *California Department of Corrections* is being sent to counsel for petitioner.

[5]We also point out, as the court of appeals noted (Pet. App. 13a; see also *id.* at 15a), that neither in the district court nor on appeal did petitioner invoke the All Writs Act, 28 U.S.C. 1651, as a source of statutory authority to require the Marshal to transport state prisoners. Nonetheless, in this Court petitioner heavily relies (Pet. 10-16) on Section 1651 and on this Court's construction of the statute in such cases as *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). However, *New York Telephone* and the other cases do not support petitioner's position. First, in those decisions Section 1651 was used to fill in the interstices of federal statutes where no specific provision explicitly addressed the issue under consideration; here, in contrast, as petitioner concedes (Pet. 15), the habeas corpus statute expressly provides for issuance of the writ to bring a prisoner to court to testify (28 U.S.C. 2241(c)(5)) and states that "[t]he writ * * * shall be

In *Ford* v. *Allen*, 728 F.2d 1369 (11th Cir. 1984) (per curiam), the court of appeals held that the district court has discretion to require the United States Marshal to transport state inmates from the state prison to the federal courthouse; it declined to consider whether that discretion had been properly exercised, holding only that the district court had statutory authority to impose the responsibility on the Marshal (*id.* at 1370). The court noted (*ibid.*) that its ruling was in accord with the decision of the Ninth Circuit in the *California Department of Corrections* case in which this Court denied certiorari. The Eleventh Circuit's ruling is also in line with the decisions of other circuits, which existed at the time of the denial of certiorari in *California Department of Corrections*, that recognize the discretion of the district

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directed to the *person having custody of the person detained*" (28 U.S.C. 2243; emphasis added). See *United States* v. *Mauro*, 436 U.S. 340, 357 (1978); see also Fed. R. Civ. P. 81(a)(2). Second, in *New York Telephone* the issuance of the writ was "necessary" (434 U.S. at 161) to "effectuate and prevent the frustration of orders [the district court] has previously issued" (*id.* at 172); in this case, on the other hand, it was not necessary or even appropriate to order the Marshal to transport state prisoners to federal court, since under the habeas corpus statute the state custodian could be required to produce them. Third, *New York Telephone* involved a private party that was directed to provide assistance to the government; thus, that case involved none of the considerations of separation of powers and sovereign immunity that are applicable where, as in the present case, the Executive is subject to an order of a court to take action or expend public funds. Fourth, in *New York Telephone* the third party subject to the writ was to be "fully reimbursed at [its] prevailing rates" for the assistance it was to provide, and compliance with the writ "required minimal effort on the part of the [third party] and no disruption to its operations" (434 U.S. at 175); here, however, no provision of the magistrate's order required the State to reimburse the Marshal or ensured that the transporting of state prisoners would not interfere with the Marshal's statutory responsibilities. Finally, *New York Telephone* does not authorize the use of the All Writs Act whenever the issuance of a writ would not impose an unreasonable burden; rather, the Court merely recognized (434 U.S. at 172) that a writ otherwise authorized by the statute would be improper if it resulted in an unreasonable burden.

court to order the Marshal to transport state prisoners.[6] Clearly *Ford* v. *Allen* does not make the petition in this case any more worthy of the Court's review than was the petition in *California Department of Corrections*.

We acknowledge that the decision below, which is the only other opinion rendered since the denial of certiorari in *California Department of Corrections,* adopts a somewhat different standard from previous decisions on the authority of the district court to involve the United States Marshal in transporting state prisoners to federal court. The Third Circuit concluded that, under the applicable statutes, the district court has no discretion generally to impose that responsibility on the Marshal. However, the court upheld the district court's discretion to do so when justified by security considerations. While this discretion may appear to be of a more limited nature than that recognized in other circuits, the application and consequences of the Third Circuit's ruling are uncertain at this time. It cannot now be known how the Third Circuit and its district courts will interpret this standard. Nor is it clear whether the courts in other circuits might have been influenced by similar sorts of security considerations in exercising their discretion. Thus, further experience is necessary to determine whether the courts in different circuits will actually reach conflicting results in specific cases or whether the perceived differences in the tests are largely semantic rather than substantive. In light of the need for such clarification and the Court's recent

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[6]See *Ford* v. *Carballo,* 577 F.2d 404 (7th Cir. 1978); *Ballard* v. *Spradley,* 557 F.2d 476 (5th Cir. 1977); see also *Story* v. *Robinson, supra.* This issue is also pending in other circuits. See *McGee* v. *Rankin,* 584 F. Supp. 1202 (W.D. Ark. 1984), appeal pending *sub nom. Arkansas Department of Corrections* v. *United States Marshals Service,* No. 84-1664-WA (8th Cir. filed May 18, 1984); *Ivey* v. *Parke,* appeal pending, No. 84-5271 (6th Cir. filed Mar. 30, 1984).

denial of certiorari in *California Department of Corrections,* we believe that review of the instant petition is not warranted.

Moreover, the United States Marshals Service has advised us that, if the Court denies certiorari, it intends promptly to seek legislation as a more satisfactory means than litigation for finally resolving this issue.[7] We agree that a legislative solution is preferable, since it would allow Congress to focus specifically on the issue and to weigh the competing interests of the respective parties in this era of expanding judicial dockets and limited governmental resources at all levels; it is eminently a choice for Congress to make whether the funds allocated to the Marshals Service should be spent for transporting state prisoners in connection with Section 1983 litigation or whether they would be better used to support other aspects of the federal judicial system. See Pet. App. 44a-45a (Becker, J., concurring). In addition, Congress can also consider a variety of systemic mechanisms and alternative approaches — such as the presentation of testimony through depositions taken in the prison (cf. Pet. App. 62a-64a), or sending magistrates to conduct proceedings at the prison where necessary — to reduce the problem of transporting prisoner witnesses. Finally, legislation would be better suited than litigation to take account of the range of historical practices and the understandings that have been developed in light of local conditions in the

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[7]Compare, *e.g.,* the Interstate Agreement on Detainers Act, 18 U.S.C. App. at 545-548. In Section 2, Article V (a) and (h), the Act specifically provides that the sending "State shall offer to deliver temporary custody of [the requested] prisoner to the appropriate authority in the [receiving] State" and that "[f]rom the time that [the receiving] State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the [receiving] State * * * shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner."

districts and divisions around the country. In the end, rather than trying to divine congressional intent in this area from general statutes that were first enacted long ago, the interests of all concerned in an informed and sound resolution would be served if the Court stays its hand in this case and allows an opportunity for the legislative process to go forward.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

DOJ-1985-01

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-489

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION

Petitioner

v.

UNITED STATES MARSHAL SERVICE, et al.,

Respondents

JOINT APPENDIX

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

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Petition for Certiorari Filed
September 24, 1984
Certiorari Granted February 19, 1985

45 pp

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DOCKET ENTRIES -- UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dist. Office: 313/2

Docket: Yr. '80; Number 2350

Filing Date: Mo. 06, Day 17, Year '80

J 3; N/S 550

Judge Number: JH 1325

Plaintiff

GARLAND, RICHARD,

Defendants

SULLIVAN, JOSEPH A. SHERIFF, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWENS (DIRECTOR OF INMATE SERVICES) THOMAS KELLY (WARDEN HOLMESBURG PRISON) GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,
COMMONWEALTH OF PENNSYLVANIA, (54)
UNITED STATES MARSHALS SERVICE (54)
Cause: Civil Rights

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Proceedings

DATE Nr.

1980

Jun 18, Complaint filed.

Jul 11, Answer of all defendants, filed.

1982

May 10, Memorandum of Law of Intervenor, Pennsylvania Bureau of Correction and Ronald Marks on the issue of inmate transportation.

May 17, Plaintiff's Petition for a Writ of Habeas Corpus Ad Testificandum filed.

May 24, Plaintiff's Motion to Compel the Issuance of Writs of Habeas Corpus Ad Testificandum and Certificate of Service, Filed.

1982

Dec 9, Memorandum, Hall, Mag. and Orders that the Superintendent of the State Correctional Institution at Huntingdon shall produce Richard Garland for the Purpose of his giving testimony and participating in the trial on 1-24-83 at 10:00 A.M. in Courtroom 5-D, the Superintendent of the State Correctional Institution at Rockview shall produce Andre Morrison for the Purpose of his giving testimony and participating in the trial on 1-24-83 at 10:00 A.M. in Courtroom 5-D, the Superintendent of the State Correctional Institution at Dallas shall produce Delbert Orr, a/k/a Delbert Africa for the purpose of his giving testimony and participating in the trial on 1-24-83 at 10:00 A.M. in Courtroom 5-D, Filed. 12-9-82 Entered and copies mailed.

1983

Jan 5, U.S. Marshals Service's Motion to Intervene as Interested Third Party, filed.

Jan 5, U.S. Marshals Service's Motion for Reconsideration, Memorandum, filed.

Jan 6, Defts' memorandum in opposition to motion for reconsideration, memorandum of law, filed.

Feb 10, Memorandum, Hall, Mag., and Order that the motion of the U.S. Marshals Service for reconsideration of the Court's Orders of 12-8-82 is denied, except with regard to the order of 12/8/82 directing the production of Larry Harris, an inmate at Holmesburg Prison, which order is vacated, filed.

Apr 8, United States Marshals Service's Notice of Appeal, filed (U.S.C.A. 83-1283), 4/11/83 Copies to: R. Garland, An. Martinez, Esquire., L.E. Fischer, Esq., B. Axelrod, Esq, D. Spitz, Judge Hannum, Clerk, U.S.C.A.

Apr 20, Order that the Motion of the Commonwealth of Pa. and the United States Marshall's Service to intervene relative to the issues involved in the court's order directing the plff. and his witnesses be transported and produced for trial in this action are granted, nunc pro tunc, May 7, 1982 and February 19, 1983, respectively, filed. 4/21/83 Entered and Copies mailed.

1984

Jul 20, Certified copy of order USCA that judgment of this court is affirmed insofar as is requires the Marshal of this court to take into custody while in the federal courthouse state prisoner witnesses

whose presence is required for testimony in civil proceedings, etc., filed.

Aug 30, Certified copy of order of U.S. Court of Appeals dd. 8/29/84 amending the caption of the Opinion filed 6/27/84 & amending the judgment entered the same day by adding the following: U.S. MARSHALS SERVICE, Intervenor-Appellant COMMONWEALTH OF PA., BUREAU OF CORRECTION, Intervenor-Appellee, filed.

Docket Entries, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal from Eastern District of
Pennsylvania
Garland
Case No. 80-2350

Title of Case

GARLAND, RICHARD,

vs.

SULLIVAN, JOSEPH A. SHERIFF, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWENS (DIRECTOR OF INMATE SERVICES) THOMAS KELLY (WARDEN HOLMESBURG PRISON) GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,
COMMONWEALTH OF PENNSYLVANIA, (54)
UNITED STATES MARSHALS SERVICE (54)
Appellant

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Maria Parisi Vickers, Deputy Attorney General, 206 State Office Building, Philadelphia, PA 19130, for Commonwealth of Pennsylvania and Commissioner Marks.

Origin: Eastern

D.C. Docket: 80-2350

D.C. Judge: William F. Hall, Jr., U.S. Magistrate

Filed in D.C.: 6-17-80

Notice of Appeal filed: 4-8-83

Case Type: Civil Rights

Docketed: 4-27-83

Proceedings

DATE	
1984	
Jun	27, Judgment -- Affirmed insofar as it requires the Marshal of the D.C. to take into custody while in the federal courthouse state prisoner witnesses whose presence is required for testimony in civil proceedings in the federal court but is reversed insofar as, without a finding of special security circumstances, it required the Marshal to transport those witnesses between the county jail and the federal courthouse, filed.
Aug	29, Order (Gibbons & Becker, C.Js & Atkins, D.J.) amending the caption of the opinion, filed.
1985	
Feb	22, Order from S.C. allowing certiorari. Filed at S.C. No. 84-489. Justice Powell took no part in the consideration of this petition, filed. (ml)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND	:	CIVIL ACTION
Plaintiff	:	
v.	:	
SHERIFF JOSEPH A. SULLIVAN, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWENS (DIRECTOR OF INMATE SERVICES) THOMAS KELLY (WARDEN HOLMESBURG PRISON) GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,	:	
Defendants	:	NO. 80-2350

COMPLAINT

JURISDICTION

1. Jurisdiction is predicated upon this court pursuant to title 42 U.S.C. §1983, §1985; Title 28, §§1331-1343; First, Eighth and Fourteenth Amendments to the U. S. Constitution.

PARTIES

2. Plaintiff, Richard Garland, was and is at all times relevant hereto, an [sic] convicted prisoner captured and maintained within the confines of Holmesburg Prison located in the County of Philadelphia.

3. Defendant Sheriff Sullivan, was and is at all times relevant hereto, in charge of the Philadelphia Sheriff's Department and is responsible for the hiring, firing, training and direction of all deputy sheriff's [sic] within said department. He is being sued in his individual and official capacity.

4. Defendants Saull, Rodrizgas, and John Does are deputy sheriffs for the county of Philadelphia, and who at all times relevant hereto, were and are responsible of safely transporting prisoners to and from court. Said defendants are being sued in their individual and official capacity.

5. Defendant David Owens, at all times relevant hereto is "now" Superintendent of Philadelphia Prisons and is responsible for the safety, security and overall well being of all prisoners confined within said prisons. He is responsible for the hiring, firing training and direction of Philadelphia County Prison Guards. He is being sued in his individual and official capacity.

6. Defendant Thomas Kelly, at all times relevant hereto, was and is Warden at Holmesburg Prison, and is responsible for the safe and secure operation of said prison as well as maintaining the safety and security of its prisoners and supervising prison personnel. He is being sued in his individual and official capacity.

7. Defendants Hannah, Bersane and Ocehsle, at all times relevant hereto were and are guards at Holmesburg Prison

and are invested with the duty to establish and maintain safety and security of prisoners and prison. Said defendants are being sued in their individual and official capacity.

8. Defendants John Does, are deputy sheriff's [sic] for the county of Philadelphia and who at all times relevant hereto, were and are responsible for safely transporting prisoners to and from court. Said defendants are being sued in their individual and official capacity.

9. All defendants herein named and relevant to the foregoing complaint, were acting under the color of state law.

FACTS

10. On April 23, 1980, while waiting in the holding area of Holmesburg Prison to be transported to Philadelphia County Court; plaintiff was viciously attacked

by defendants Rodrizgas and Saull, without any provocation that could be attributed to the actions of the plaintiff.

11. As mentioned in preceding [sic] paragraph, plaintiff's being attacked was precipitated by said defendants conjured irritation when plaintiff displayed a "On the Move" button, which was pinned to his clothing. The button mentioned was not considered contraband nor did it bare [sic] any material that would signify same as being a security hazard of any kind.

12. Plaintiff contends that he is a supporter of the Move Organization, as taught through the religious order founded by "JOHN AFRICA", which is an established religion by all standards of life. That any button worn by plaintiff signifying his support for the natural order of life, should not be construed

as provocation to inflict cruel punishment and religious persecution upon his person and way of life as a human element. For example Catholics, Muslims, Jews, are in this prison, yet none of them recieve [sic] the treatment I recieved [sic].

13. While plaintiff was being subjected to the aforementioned attack by defendants Rodrizgas and Saull; defendants, John Does, Defendants Ocehsle, Bersane and Hannah stood idle and made no effort to restrain plaintiff's attackers; although said attack was unwarranted.

14. Upon arrival at City Hall Courthouse in Philadelphia; plaintiff was taken to the sheriff's cell room and separted [sic] from other prisoners who were transported along with him. Immediately after being separated from other prisoners; plaintiff was approached

by defendants Rodrizgas and Saull and six John Doe defendant deputy sheriff's [sic] who launched a second unprovoked and unwarranted physical attack upon plaintiff's person.

15. The compound result of both physical attacks upon plaintiff's person requied [sic] the reception of fifteen stitches in plaintiff's mouth, suffering an assortment of body and head bruises.

CLAIM FOR RELIEF UNDER U.S.C. 42 SECTION 1983

16. Paragragh's 1 thru 16 are re-stated and incorporated by reference herein.

17. The unwarranted physical beating attack endured by plaintiff at the hands of defendants herein named, constituted cruel punishment in violation of alleged constitutional rights which supposedly governs these United States and this

Commonwealth of Pennsylvania and its inhabitants of which plaintiff is one.

18. The avtion [sic] of defendants against plaintiff as stated herein, which were the results of plaintiff's religious beliefs, constitutes religious persecution in violation of both the U.S. and Pennsylvania Constitution.

19. A claim for relief is further-cited [sic] where the lingering effects of physical pain, mental anguish and religious degradation continue to cause suffering upon the being of plaintiff, as manifested through the cruel punishment and religious persecution inflicted by defendants.

20. Defendants Owens, Kelly, Bersane, Ocehsle, and Hannah are liable for damages in neglecting their duty to provide safety and security for plaintiff in the instant matter and protect him from unwarranted attacks while under the

jurisdiction of Holmesburg Prison, especially where the attackers are without legal authority to launch such attack.

CLAIM FOR RELIEF UNDER U.S.C. 42 SECTION 1985

21. Paragragh's 1 thru 16 and 17 thru 20 are restated and incorporated by reference herein.

22. The acts and actions of all the defendants herein named reveal that same did conspire to deprive plaintiff of his human and constitutional rights to be free from cruel punishment and religious persecution and to be provided due process and equal protection of law.

CLAIM FOR RELIEF UNDER U.S.C. 42 SECTION 1986

22. [sic] Paragragh's 1 thru 16 and 16 thru 20 are restated and incorporated by reference herein.

23. All defendants herein named in the forgoing [sic] cause of action were so situated that anyone or all of them could have acted to prevent plaintiff from suffering cruel punishment and religious persecution, without being afforded due process and equal protection of law; but same defendants failed and neglected to do so.

RELIEF

WHEREFORE, Richard Garland, requests this court to award the following relief:

Compensatory damages in the amount of one million cash American dollars or gold from all defendants named.

Punitive damages in the amount of one million cash American dollars or gold from all defendants named.

Declaratory damages in the amount of one million cash American dollars or gold from all defendants named.

/s/_____
Richard Garland
79-03284
8215 Torresdale Avenue
Post Office Box 6268
Philadelphia, Pennsylvania
19136

APPLICATION TO PROCEED IN FORMA PAUPERIS

I, RICHARD GARLAND, declare under the penalty of perjury, that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I declare that because of my poverty I am unable to pay the costs of said proceedin [sic] or to give security therefor and that I believe I am entitled to relief.

I presently am not employed and have not been employed since 12/12/78.

I have not received any income from a business, profession, in the form of rent payments, interests, dividends, pensions, annuities, social security benefits, support payments or other sources.

I do not own any cash or checking or savings accounts.

I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

Due to my present financial situation, there is no-one dependant [sic] upon me, nor do I owe any other debts or obligations.

/s/
Richard Garland
79-03284
8215 Torresdale Avenue
Post Office Box 6268
Philadelphia, Pennsylvania
19136

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND	:	CIVIL ACTION
Plaintiff	:	
v.	:	
SHERIFF SULLIVAN	:	
Defendant	:	NO. 80-2350

MEMORANDUM AND ORDERS

WILLIAM F. HALL, JR
UNITED STATES MAGISTRATE December 8, 1982

In this action[1] the plaintiff, an inmate at the State Correctional Institution at Huntingdon (Huntingdon), has alleged that his First and Eighth and Fourteenth Amendment rights were violated by the defendants when they allegedly beat him because of his support of MOVE. He now seeks the issu-

---

[1]The matter was originally assigned to Hon. John B. Hannum. On July 15, 1981 the parties consented to have the matter proceed before a United States Magistrate.

ance of a writ of habeas corpus ad testificandum in order to have himself and eight (8) incarcerated non-party witnesses transported to and from the courthouse so that they may appear at the trial of his case. For the reasons that follow, the petition will be granted but with limitations as to the number of witnesses who will fall within the scope of the writ.

The plaintiff proposes to give testimony and to represent himself at the trial aided by an "advisory counsel". It is well settled that prisoners have no absolute right to be present at the trial of civil rights actions. Moeck v. Zajackowski, 541 F.2d 177 (7th Cir. 1976); McKinney v. Boyle, 447 F.2d 1091 (9th Cir. 1971). As the Court explained in Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L.Ed. 1356 (1948), "Lawful incarceration brings

about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Among the rights identified by the Court as being so limited is the right given to parties in all courts of the United States to plead and manage their own cases personally. See: 28 U.S.C. Section 1654. However, a fair and effective adjudication of this case requires the presence of the plaintiff at the trial. For, without the assistance of the Court his appearance at the trial cannot be insured. The issuance of a writ of habeas corpus ad testificandum is such assistance that can be given to insure his appearance at the trial.

Under 28 U.S.C. §2241(c)(5) the court has the discretionary authority to secure the appearance of a state or federal prisoner by the issuance of a writ of habeas

corpus ad testificandum when it is necessary to bring him into court to testify or for trial. Jerry v. Francisco, 632 F.2d 252, 255 (3d Cir. 1980). In exercising that discretion, however, the court must weigh "the interest of the plaintiff in presenting his testimony in person against the interest of the state in maintaining the confinement of the plaintiff-prisoner." Jerry v. Francisco, supra at 255, quoting Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 1976).

The Court in Jerry adopted the criteria employed in Stone v. Morris, supra, and held that the consideration of the issuance of the writ should take into account such factors as (1) the cost and inconvenience of transporting the prisoner; (2) the potential danger and security risk; (3) the substantiality of the matter at issue; (4) the need for an early determination of the

matter; (5) the possibility of delaying trial until the prisoner is released; (6) the integrity of the correctional system; and (7) the interests of the inmate in presenting his testimony live rather than by deposition. Id. at 255.

Upon application of these criteria to the factual background as it applies to the plaintiff himself, the issuance of the writ is deemed justified. Although the court does not have before it any data as to the cost of producing the plaintiff for the trial, the Commonwealth of Pennsylvania (Commonwealth) has intervened and alleged that it does not have sufficient resources to pay the costs attendant with the production and maintenance of the plaintiff during the trial. The Commonwealth's argument, however, fails to address any excessive costs attendant with producing this particular plaintiff but rather, it

argues that it suffers from a general fiscal insufficiency that would preclude it from producing the plaintiff. Clearly, whenever, the production of a prisoner is ordered, the expenditure of some funds is required, however, in balancing the cost and inconvenience to the Commonwealth against the interests of the prisoner, the question is not whether not producing the prisoner would be less expensive, because it always would be. Rather, the test is whether the production of the prisoner is likely to be excessive because of, e.g. the need for providing extra security. Such costs and inconvenience must then be weighed against the substantiality of the issues the plaintiff's claim presents. Here the plaintiff who has alleged serious violations of his constitutional rights has been before the court several times for preliminary

matters and has not presented any security problems nor exhibited behaviour that would lead the court to anticipate any abnormal security problems if he were to appear again for this trial. Although the cost and inconvenience of transporting the plaintiff from prison to this courthouse are probably significant, it has not been shown that the costs in this instance are excessive and outweigh the plaintiff's interest in presenting testimony and personally managing his own case.

Although there is not apparent need for an early determination of the issue in this case, a postponement of the trial until after the plaintiff is released from prison would be unfair. The plaintiff is currently serving a sentence of ten years and his release before that time is not foreseeable. A delay of the trial until then with the

possible unavailability of witnesses to the events complained of and/or the possible diminution of their memories after the passage of so many years would render a redress of the plaintiff's alleged constitutional injuries virtually unobtainable. The alternative of obtaining the plaintiff's testimony by deposition in lieu of his appearance in court is also unsuitable. The matter will be tried to a jury at the demand of the defendants. Because of the nature of the alleged misconduct of the defendants the credibility of all of the witnesses will, no doubt, be crucial and the jury should be given the opportunity of hearing and seeing the plaintiff as well as all of the witnesses to the alleged acts of the defendants. Testimony of the plaintiff by way of his deposition will not serve that purpose. Moreover, because the plaintiff will

represent himself at the trial, he will be an indispensable participant in the proceedings and not just a witness.

Finally, it is important once an inmate's action reaches the trial stage as is the case here, that a court take all reasonable steps necessary to insure that he receives the "fair day in court" to which he is entitled. Holt v. Pitts, 619 F.2d 558 (6th Cir. 1980). Here the plaintiff's presence in court is reasonably necessary to insure a fair adjudication of his claims. Accordingly, a writ of habeas corpus ad testificandum will be issued requiring his presence at the trial.

The plaintiff also requests the production of Larry Howard, Larry Harris, Andre Morrison and Delbert Africa all of whom are inmates of various penal institutions in Pennsylvania. These proposed witnesses will give eye witness testimony

which the plaintiff has described in his petition as noncumulative testimony which will describe different stages and aspects of the confrontation between the plaintiff and the defendants. In addition, Delbert Africa, according to the plaintiff, will testify about the plaintiff's physical condition immediately prior to and subsequent to the alleged beatings of the plaintiff by the defendants. The proposed testimony is not only relevant to the issues involved in the case, but is also of sufficiently high probative value to require its production to insure a fair adjudication of the plaintiff's claims. The same considerations that were applied in determining whether the writ should be issued to secure the appearance of the plaintiff, applies in determining whether the writ should be issued to secure the appearance of these nonparty

witnesses. Jerry v. Francisco, supra, at 255. Having applied those criteria, the court finds that the interest of the plaintiff in having these witnesses present at the trial to present the proposed testimony outweighs the interest of the Commonwealth in maintaining them in their respective institutions. Accordingly, the writ will be issued as to them as well.

The plaintiff has also requested the court to issue the writ to insure the appearance of Chuck Africa, Frank Africa, Conrad Africa, Phil Africa and Edward Africa all of whom are also inmates in various Pennsylvania penal institutions. The plaintiff proposes to present testimony by these witnesses as to his reputation for honesty and truthfulness. Generally, such evidence is not admissible in a civil proceeding under the Federal

Rules of Evidence (Rule 404). Although character evidence in support of credibility is admissible, it is admissible only when a witness' character for untruthfulness has been attacked. (Rule 608(a)). Inasmuch as the plaintiff will not be able to put these witnesses on in his case in chief and not at all unless his character for truthfulness is attacked, it cannot be said that their appearance is necessary to assure the fair adjudication of his claims. In view of the cost and inconvenience to the Commonwealth that would be attendant with producing them for trial, the court finds that the interest of the Commonwealth in maintaining them in their respective institutions outweighs the interests of the plaintiff in having them produced for the trial. Similarly, testimony of any or all of these witnesses to corroborate the plaintiff's own testimony

relative to his religious beliefs, as the plaintiff also proposes, would be, if admissible, of such limited probative value that it is also deemed not necessary for the fair adjudication of the plaintiff's claims. The interest of the Commonwealth clearly outweighs the interest of the plaintiff when considering whether any or all of these witnesses should be produced for trial for this added purpose. Accordingly, the plaintiff's petition insofar as it seeks the issuance of a writ of habeas corpus ad testificandum requiring the production of Chuck Africa, Frank Africa, Conrad Africa, Phil Africa and Edward Africa is denied.

The Court's orders requiring the production of the plaintiff, Larry Howard, Larry Harris, Andre Morrison and Delbert Africa for the trial of this matter accompany this memorandum. However, for clarity it is noted here that to be in

compliance with the orders, the custodians of the foregoing inmates shall transport them from their present institutions to the county prison nearest to this courthouse from whence the United States Marshal shall transport them to and from the courthouse for their appearance at the trial of the case. The U.S. Marshal shall also be responsible for maintaining custody of these prisoners while they are in this courthouse.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND	:	CIVIL ACTION
Plaintiff	:	
v.	:	
SHERIFF SULLIVAN	:	
Defendant	:	NO. 80-2350

ORDER

AND NOW, to wit, this 8th day of December, 1982, it is ORDERED that the Superintendent of the State Correctional Institution at Huntingdon (Huntingdon) shall produce Richard Garland, F-4140, now confined at Huntingdon, for the purpose of his giving testimony and participating in the trial of the above captioned case beginning on Monday, January 24, 1983 at 10:00 A.M. in Courtroom 5-D, U.S. Courthouse, 601 Market Street, Philadelphia, PA. In producing Mr. Garland, it shall be the

responsibility of the Superintendent to transport him to the county jail nearest this courthouse. The U.S. Marshal shall then be responsible for transporting him to and from the county jail for his court appearances in this matter. The Marshal will also be responsible for maintaining custody of him while he is in the courthouse for the trial.

BY THE COURT:

/s/
WILLIAM F. HALL, JR.
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND	:	CIVIL ACTION
Plaintiff	:	
v.	:	
SHERIFF SULLIVAN	:	
Defendant	:	NO. 80-2350

ORDER

AND NOW, to wit, this 8th day of December, 1982, it is ORDERED that the Superintendent of the State Correctional Institution at Rockview (Rockview) shall produce Andre Morrison now confined at Rockview, for the purpose of his giving testimony at the trial of the above captioned case beginning on Monday, January 24, 1983 at 10:00 A.M. in Courtroom 5-D, U.S. Courthouse, 601 Market Street, Philadelphia, PA. In producing Mr. Morrison, it shall be the responsibility of the Superintendent to

transport him to the county jail nearest this courthouse. The U.S. Marshal shall then be responsible for transporting him to and from the county jail for his court appearances in this matter. The Marshal will also be responsible for maintaining custody of him while he is in the courthouse for the trial.

BY THE COURT:

/s/
WILLIAM F. HALL, JR.
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND	:	CIVIL ACTION
Plaintiff	:	
v.	:	
SHERIFF SULLIVAN	:	
Defendant	:	NO. 80-2350

ORDER

AND NOW, to wit, this 8th day of December, 1982, it is ORDERED that the Superintendent of the State Correctional Institution at Dallas (Dallas) shall produce Delbert Orr, a/k/a Delbert Africa, now confined at Dallas, for the purpose of his giving testimony at the trial of the above captioned case beginning on Monday, January 24, 1983 at 10:00 A.M. in Courtroom 5-D, U.S. Courthouse, 601 Market Street, Philadelphia, PA. In producing Mr. Orr, it shall be the responsibility of the

Superintendent to transport him to the county jail nearest this courthouse. The U.S. Marshal shall then be responsible for transporting him to and from the county jail for his court appearances in this matter. The Marshal will also be responsible for maintaining custody of him while he is in the courthouse for the trial.

BY THE COURT:

/s/
WILLIAM F. HALL, JR.
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 83-1283

GARLAND, RICHARD
v.
SULLIVAN, JOSEPH A. SHERIFF
DEPUTY SHERIFF SAULL
DEPUTY SHERIFF RODRIZGAS
DAVID OWENS (DIRECTOR OF INMATE SERVICES)
THOMAS KELLY (WARDEN HOLMESBURG PRISON)
GUARD BERSANE
GUARD HANNAH
GUARD OCEHSLE,
DEPUTY SHERIFF JOHN DOE
DEPUTY SHERIFF JOHN DOE
DEPUTY SHERIFF JOHN DOE
DEPUTY SHERIFF JOHN DOE
DEPUTY SHERIFF JOHN DOE
DEPUTY SHERIFF JOHN DOE
COMMONWEALTH OF PENNSYLVANIA
UNITED STATES MARSHALS SERVICE

United States Marshals Service,
Appellant

(D.C. Civil No. 80-2350)

Present: GIBBONS and BECKER, circuit Judges and ATKINS, District Judge[2]

It is ORDERED that the caption of the opinion of this Court filed June 27, 1984 and of the judgment entered the same day be amended by adding the following:

---

[2]Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES MARSHALS SERVICE
Intervenor-Appellant

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION
Intervenor-Appellee

By the Court:

/s/ Circuit Judge

Dated: Aug. 29, 1984

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-489

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1984

Commonwealth of Pennsylvania
Bureau of Correction

Petitioner

v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,

Respondents

Appeal from the Judgment of
The United States Court of Appeals
For The Third Circuit

BRIEF OF PETITIONER

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

By: Maria Parisi Vickers
SENIOR DEPUTY ATTORNEY GENERAL

Andrew S. Gordon
SENIOR DEPUTY ATTORNEY GENERAL

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58 pp

QUESTION PRESENTED

Whether a district court has the authority to direct the United States Marshal's Service to share responsibility with state officials for the production of state inmates to appear in federal district court for the trial of a civil action in which neither the state nor its officials is a party.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-489

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION,

Petitioner

vs.

UNITED STATES MARSHALS SERVICE, et al.,

Respondents

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 4a-45a) is reported at 737 F.2d 1283. (hereinafter "Pet. App. ____.")

The memorandum and order of the magistrate (Pet. App. 46a-65a) is not reported.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this case.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a - 3a) was entered June 27, 1984. The petition for writ of certiorari was docketed on September 24, 1984. Certiorari was granted on February 19, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The All Writs Act, 28 U.S.C. §1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C. §2241, provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless --

(5) It is necessary to bring him into court to testify or for trial.

3. 28 U.S.C. §2243 provides in pertinent part:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, ... shall be directed to the person having custody of the person detained.

* * *

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

4. 28 U.S.C. §567:

Under regulations prescribed by the Attorney General, each United States Marshall shall be allowed --

* * *

(2) The expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards ...

5. 28 U.S.C. §569:

(a) The United States Marshal of each district is the marshal of the district court .... and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under the authority of the United States, ... and command all necessary assistance to execute their duties.

STATEMENT OF THE CASE

This action began when a prisoner, Richard Garland, brought a civil rights suit pursuant to 42 U.S.C. §1983 against various Philadelphia County officials alleging that they had violated his rights by beating and harassing him. The matter was referred to a magistrate by consent of the parties for disposition on the merits, pursuant to 28 U.S.C. §636(c)(1). In the course of the proceedings, on February 8, 1983, the magistrate ordered the superintendents of various state prisons to transport the plaintiff-inmate and other inmate witnesses to the county prison nearest the United State

Courthouse.[2] In the same orders, the magistrate further directed the United States Marshal [hereinafter "Marshal"] to transport the inmates from the county jail to the federal court and to maintain custody over these inmates during their appearances in court. (J. App. 36a - 41a[3])

---

[2]Plaintiff, Garland, was confined in a Philadelphia County jail when he initiated the lawsuit; however, at all times relevant to the issues raised in this appeal, he was in custody of the Pennsylvania Bureau of Correction at its institution at Huntingdon, Pennsylvania which is approximately 220 miles from Philadelphia. Two of the witnesses were confined at the State Correctional Institution at Rockview (approximately 218 miles from Philadelphia) and at the State Correctional Institution at Dallas (approximately 143 miles from Philadelphia). Pet. App. 8a The county jail nearest the federal courthouse is the Philadelphia Detention Center, which is approximately 5 miles from the courthouse.

[3]"J. App." refers to the joint appendix filed in this case.

The Marshal, an intervenor in the action,[4] moved for reconsideration of that portion of the magistrate's order which apportioned to it the responsibility of transporting the prisoner-witnesses from the county jail to the federal courthouse, and thereafter of maintaining custody of the prisoners while in the courthouse.[5] The Marshal's motion for reconsideration was denied. In rejecting the motion for reconsideration, the magistrate viewed his orders to the Marshal as authorized by 28 U.S.C. §569(b). Pet. App. 52a-55a.

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[4]On April 20, 1983, intervenor status was granted to the Commonwealth of Pennsylvania, Bureau of Correction and to the Marshal, nunc pro tunc as of May 7, 1982 and January 19, 1983 respectively.

[5]The Commonwealth did not appeal from the portion of the order which directed it to transport the inmates to Philadelphia.

The court reasoned that the order was ancillary to the writs of habeas corpus ad testificandum issued pursuant to 28 U.S.C. §2241(c)(5). Since Section 569(b) required the Marshal to execute all lawful writs and orders, the court determined that there was authority for its orders.

The magistrate supported his orders with pragmatic concerns. He noted that, as a general matter, the increased volume of litigation by prisoners has produced a strain on governmental and judicial resources. Pet. App. 57a. Correspondingly, the need for writs of habeas corpus ad testificandum has swelled. Turning to the peculiar circumstances of tnis case, the magistrate observed that his orders required the production of three prisoners who were incarcerated at

different prisons, all a considerable distance from the courthouse. Pet. App. 58a-59a. This imposed a significant financial burden on the state. Pet. App. 59a. In attempting to alleviate, to the degree possible, this financial strain, the magistrate drew upon his intimate familiarity with the Marshal's regular duties; namely, that the Marshal makes frequent trips to the Philadelphia Detention Center, which is close to the courthouse. Pet. App. 59a-60a. It was on this basis that the magistrate concluded that, on balance, it would be equitable and in the interest of justice to relieve the state of, and impose on the Marshal, the limited obligation of transporting the prisoners from the county facility to the federal courthouse.

The Marshal appealed.[6] The Third Circuit Court of Appeals held that the District Court, and therefore the magistrate, has the statutory authority to direct the Marshal to maintain custody over a state prisoner-witness in the federal courthouse but that the court lacks authority, without a finding of special security circumstances, to order the Marshal to transport that prisoner between the county jail and the federal courthouse.

In the lead opinion by Judge Gibbons, the Court of Appeals began its analysis of the issue by focusing on the source of judicial authority to issue

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[6]The subject of the appeal is entirely collateral to the underlying action, disposing of the transportation issue fully and finally; hence, the Court of Appeals held that it had jurisdiction under the "collateral order" doctrine as described in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

writs, process and orders. It pointed out that 28 U.S.C. §569(b), relied upon by the magistrate, is merely a directive to the Marshal to execute writs when they have been issued pursuant to some other authority. The court then turned to the All Writs Act, 28 U.S.C. §1651, to determine whether this statute authorizes a district court to order the Marshal to assume any transportation responsibility for state inmates. The court did not find such authority in the All Writs Act, holding, instead, that the magistrate's order was, in fact, a writ of habeas corpus ad testificandum properly addressed to the custodian, with a mandamus added to it directed to the Marshal. The court then concluded that the mandamus was inappropriate, relying on McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268

(1821). Judge Gibbons did conclude, however, that the magistrate properly ordered the Marshal to maintain custody of the prisoners while they are in the federal courthouse but that unless

> a federal court makes a specific finding that security circumstances exist which require an order that state prisoner witnesses be taken into the marshal's custody at a situs away from the federal courthouse, §569(a) does not authorize such an order.

Pet. App. 22a - 23a.[7]

Judge Becker, concurring as to the courthouse custody issue and concurring in the judgment, expressed some serious bewilderment with McIntire and McClung. He noted that the result here undercut the flexibility which should be accorded to district courts to deal with problems of this nature and

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[7]The Marshal did not file a cross-petition on the courthouse custody issue.

might discourage the courts from ordering the production of prisoners to testify. Judge Atkins dissented in part, concluding that the magistrate's order was proper in every respect.

SUMMARY OF ARGUMENT

1. a. The Court of Appeals' restrictive interpretation of the All Writs Act, 28 U.S.C. §1651, fails to recognize the flexible character of this statute. The clearly broad language of this Act manifests Congressional intent to give federal courts the power to fashion orders and writs which will meet the challenges of an evolving jurisprudence.

b. The order issued in this case was a proper exercise of the court's discretion. The magistrate properly weighed the substantial burden on the state custodians and the minimal burden on the Marshal in determining that a transfer of custody was appropriate.

2. The habeas corpus statute upon which the district court relied, 28

U.S.C. §2241, does not compel the district court to address a habeas corpus ad testificandum writ exclusively to the custodian, neither does it preclude a transfer of custody from the custodian to the United States Marshal. Moreover, the Marshal has a statutory obligation to obey the lawful orders and writs of the federal courts, 28 U.S.C. §569(b), and is statutorily authorized to expend funds for the specific purpose of transporting prisoners. 28 U.S.C. §567.

Argument

I. THE COURT OF APPEALS' RESTRICTIVE INTERPRETATION OF THE ALL WRITS ACT GOES AGAINST THE CLEAR MEANING OF THE STATUTE AND THE INTERPRETATION GIVEN IN THE DECISIONS OF THIS COURT

This Court is well aware that the number of federal civil rights actions filed by state prisoners has risen dramatically in recent years. This increase has been accompanied by a similarly dramatic drain on the state's financial resources simply because the state happens to be the custodian of inmates who are prosecuting suits which, as here, often do not even involve a state official as a defendant. The veritable deluge of such civil rights actions is a recent phenomenon in American jurisprudence, one certainly unforeseen at common-law; consequently,

the tools available to the judiciary must be used creatively in order to respond to the changing demands on the judicial system. The need for such flexibility was foreseen by Congress when it enacted the All Writs Act, 28 U.S.C. §1651; under the aegis of this statute and its predecessors,[8] this Court has responded to the legislative invitation by approving new tools fashioned by lower courts faced with new problems.

It is undisputed that the magistrate who issued the writs in question here is vested with jurisdic-

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[8]What is now Section 1651 originated as a part of Section 14 of the First Judiciary Act. 1 Stat. 81-82 (1789) and later became R.S. § 716 (1875). After further amendment it took on its present form. See Carbo v. United States, 364, U.S. 611, 615-616 (1961).

tion to hear the case.[9] Pursuant to 28 U.S.C. §2241(c)(5) he issued writs of habeas corpus ad testificandum directing the state to transport the plaintiff and his witnesses from the various state institutions in which they were incarcerated to the county prison nearest the federal courthouse and then to surrender plaintiff and his witnesses to the Marshal for the limited purpose of their court appearance. Pet. App. 51a. The magistrate's orders to the prison superintendents to surrender custody of the prisoners were to be executed by the Marshal; this, pursuant to 28 U.S.C. §569(b) which provides that

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[9]Plaintiff's complaint alleges jurisdiction pursuant to 28 U.S.C. §§1331-1343, with the Civil Rights Act as the remedial vehicle.

Marshals shall execute all lawful writs and orders issued under the authority of the United States. Pet. App. 52a. So the first condition under Section 1651, that the case be "in aid of" the court's jurisdiction, is satisfied.

The Court of Appeals' holding that the magistrate was without authority under the All Writs Act to fashion that portion of the order which was addressed to the Marshal followed what can only be termed a cursory analysis of this Court's teachings in United States v. New York Telephone Co., 434 U.S. 159, 171 (1977); Harris v. Nelson, 394 U.S. 286 (1969); and Price v. Johnston, 334 U.S. 266 (1948). In fact, in each of these cases, this Court reaffirmed the flexibility of the All Writs Act, recognizing it as a judicial arsenal from which courts can develop new tools as the need arises.

In Price, the issue was whether a court of appeals had the power to order a prisoner to be brought before it to argue his own appeal. After reviewing the various writs available at common law[10] the Court pointed out that none

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[10]The Court focused on 3 Blackstone's Commentaries 129-132:

(1) Habeas corpus ad respondendum. Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."

(2) Habeas Corpus ad satisfaciendum. Issued "when a prisoner hath had judgment issued against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with the process of execution."

(3) Habeas corpus ad prosequendum, testificandum, deliberandum, etc. Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.

(4) Habeas corpus ad faciendum et recipiendum. This "issues out of any of

FOOTNOTE CONTINUED ON NEXT PAGE

had been used for the purpose of producing a prisoner to argue an appeal. This, however, did not mean that a writ in the nature of habeas corpus could not be issued. The Court stated:

> [W]e do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under §262 of the Judicial

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the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant together with the day and cause of his caption and detainer (whence the writ is frequently denominated an habeas corpus cum causa), to do and receive whatsoever the king's court shall consider in that behalf."

(5) Habeas corpus ad subjiciendum. The "great and efficacious writ" which is directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, ad faciendum, subjiciendum, et recipiendum, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."

334 U.S., at 281.

> Code,[11] is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of "law", a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the habeas corpus writ authorized by §262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read §262 as an ossification of the practice and procedure of more than a century and a half ago. Rather, it is a legislatively approved source of procedural instruments designed to achieve "the rational ends of law."

334 U.S., at 282.

Judge Becker, who concurred in portions of the lead opinion and concurred in the judgment below, found that the magistrate could not issue the writ to the Marshal pursuant to 28

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[11] §262 of the Judicial Code is the statutory precursor to 28 U.S.C. §1651.

U.S.C. §1651 because

> there is a difference between the creation of new writs to satisfy new needs and the expansion or modification of existing writs. With the latter the traditional forms and doctrine may be said to express the limits of the writ.

Pet. App. 31a.

This view was expressly rejected in Price:

> The ordinary forms and purposes of the writ may often have little relation to the necessities of the appellate jurisdiction of those courts. Justice may on occasion require the use of a variation or modification of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in §262.

334 U.S., at 283-84 (emphasis supplied). Here, as[12] in Price

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[12] Price also points out the Court of Appeals' error in rigidly compartmentalizing its discussion of habeas corpus and the All Writs Act.
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because times have changed, and so have the needs of the courts, the All Writs Act provides the necessary authority for modifications of existing modes of procedure.

Similarly, in Harris, the Court held that, despite the absence of direct statutory authority, the district court properly issued a discovery order in connection with a habeas corpus proceeding. Referring to the All Writs Act, the Court observed:

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Although recognizing that the writ at issue was "in the nature of a writ of habeas corpus," 334 U.S, at 279, the Price Court analyzed the case and approved issuance of the writ under the All Writs Act, not Section 2241. These statutes should be read as supplementary to one another in light of their common origin. 1 Stat. 81-82 (1789). See also Carbo v. United States, 364 U.S. 611, 614-617.

> This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"

394 U.S., at 299. (citations omitted).

More recently, in New York Telephone Company, the Court affirmed a district court order directing a telephone company, which was not a party to the original action, to assist the FBI in installing pen registers. The Court acknowledged the limits of its power to impose duties upon third parties in holding that "unreasonable burdens may not be imposed;" however, the order of the district court was deemed authorized by the All Writs Act and consistent with congressional intent. 434 U.S., at 172.

The order of the magistrate here clearly falls within the guidelines set

forth by this Court's decisions. It is in the interest of justice for a federal court to fashion a procedural device which allows it to exercise its jurisdiction in civil rights litigation and to do so with a sensitivity to the interests of all the parties concerned.[13]

Consistent with these cases, petitioner contends only that the district court has discretion in appropriate cases to call upon the Marshal for assistance. See Price v. Johnston, supra, 334 U.S., at 284.

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[13]As Judge Becker noted below, a district court faced with a request to produce a prisoner must consider, in addition to the need for the testimony, the cost and burden of production. Pet. App. 42a. A ruling which limits the district court's flexibility in these matters may cause those courts to deny production requests in marginal cases. This may adversely affect the administration of justice.

"[T]his discretion is to be exercised with the best interests of [all parties] . . . in mind." Ibid. Here, the magistrate properly considered several factors in arriving at his decision, among them (1) the interest of the plaintiff in being present at trial and having his witnesses present as well; (2) the Commonwealth's burden in transporting prisoners from various state prisons, all considerably distant from Philadelphia;[14] (3) the Marshal's frequent trips to the nearby county jail, which minimized any burden on the Marshal. Although the assistance of the Marshal was, perhaps, not strictly necessary in this case, it certainly was "appropriate" and a proper exercise of discretion under the facts of this

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[14] See note 1, supra.

case. See U.S. v. New York Telephone Co., supra, 434 U.S., at 173. Pet. App. 59a.

Although it may appear at first blush that, once the inmates are transported to the Philadelphia area, the burden is the same whether undertaken by the Marshal or the state, practice proves this assumption to be untrue. State prisoners needed for court in Philadelphia are transported to the State Correctional Institution at Graterford, located 35 miles from the federal courthouse. When the prisoners are needed in court, corrections officers must be taken from their normal duties to transport the prisoners to Court and remain there until their appearances are completed. In practice, this often wastes an entire day for these officers. By contrast, as the

magistrate found, the Marshal makes regular trips to the nearby Philadelphia Detention Center in the course of his normal duties. Pet. App. 59a.

In formulating his order, the magistrate was faithful to the authority granted him under the All Writs Act[15] and mindful of the guidance of this Court in considering the burden to third parties -- here the Commonwealth and the Marshal.

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[15]Although the magistrate did not specifically rely on 28 U.S.C. §1651, the order conforms to that statute's requirements as interpreted by this Court.

II THE DISTRICT COURT ORDER TRANSFERRING CUSTODY FROM THE STATE CUSTODIAN TO THE MARSHAL WAS AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW.

A. The Order Did Not Conflict With The Habeas Corpus Statute.

1. According to the reasoning of the Court of Appeals, the magistrate's order amounts to a writ of habeas corpus ad testificandum properly directed to the custodian and the order to transfer custody to the Marshal is an unauthorized attempt to shift the burden of responding to the civil process from the Commonwealth of Pennsylvania to the United State Treasury. In so holding, the court misconstrued the limits of 28 U.S.C. §2241, the habeas corpus statute upon which the magistrate relied. While it is true that traditional wisdom teaches that the writ of habeas corpus has been directed to the custodian, the

statutory construction given this statute by this Court cautions against lumping all writs of habeas corpus together under one rubric.

In Carbo v. United States, 364 U.S. 611 (1961), the Court was presented with the issue of whether the territorial limitations in §2241(a) apply to a writ of habeas corpus ad prosequendum. After analyzing the historical bases and practical consequence of applying territorial limitations to a writ which seeks to have an inmate transported from one jurisdiction to another to stand trial, the Court held that the writ of habeas corpus ad prosequendum has no geographical limitations on its use, but that the territorial limitations make sense when applied to the Great Writ with which §2241 is principally

concerned.[16]

The Court of Appeals here has assumed, without discussion, that federal courts are without authority to fashion a writ of habeas corpus ad testificandum and to require a transfer

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[16]Although this Court has not decided whether writs of habeas corpus ad testificandum may issue outside a district court's territorial limits, Carbo v. United States, 364 U.S. 611, 618 fn. 13 (1961), some circuit courts have held that there are no territorial limits on such writs. Itel Capital Corp. v. Dennis Mining Supply and Equipment, Inc., 651 F.2d 405, 406, 407 (5th Cir. 1981); Stone v. Morris, 546 F.2d 730, 737 (7th Cir.1976). This extension of the writ, coupled with states' participation in cooperative compacts which permit inmates sentenced in one state to be confined in another, can generate unbearable transportation burdens for states if they alone, as custodians, are to be held responsible for producing inmates in federal court to testify in civil actions with which the state has no connection.

of custody.[17] The law is simply not so clear. In fact, Carbo suggests a contrary result:

> [r]igid formulae, even as to the issuance of the Great Writ, may be tempered by factual considerations requiring the decision that its "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court" after suit was begun.

364 U.S., at 621, quoting Ex Parte Endo, 323 U.S. 283 (1944).

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[17]The Court of Appeals' reliance on hornbook law, 97 CJS Witnesses §30 c (1957), for the proposition that that the custodian is responsible for the production of a prisoner pursuant to a writ of habeas corpus ad testificandum (Pet. App. 27a) does not go far enough; that section provides further that "where the testimony is desired in a civil action or proceeding, such custodian is tendered or paid the expenses of bringing up and returning his prisoner, but without being tendered such expenses where the writ is issued at the instance of [the] accused in a criminal prosecution...." (footnoted omitted).

Section 2241 describes the court's power to grant a writ and authorizes the writ of habeas corpus ad testificandum under §2241(b)(5); this section does not specify to whom such a writ should be directed. If we look at §2243, which deals with the issuance, return and hearing on a writ, its provisions suggest that this section, like the provision examined in Carbo, is concerned primarily with the Great Writ; it states in part:

> The writ, or order to show cause shall be directed to the person having custody of the person detained.
>
> . . .
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> ...
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The critical and indispensable presence of the custodian is obvious when we consider that the Great Writ challenges the very detainment to which the petitioner is subject and it inevitably falls upon the custodian to produce the prisoner and explain the reasons for the detention. Moreover, if the prisoner's arguments succeed, the result is that he will be ordered released. McNally v. Hill, 293 U.S. 131, 136 (1934); Wales v. Whitney, 114 U.S. 564, 574 (1885). Under these circumstances it is understandable that the custodian should be present with the prisoner.

In this case, we are not dealing with a writ which challenges the detainment of an inmate; on the contrary, the inmate is sought to give testimony in a civil case in which he is either the plaintiff or a witness. The

custodian has absolutely nothing for which to answer to the court which goes to the merits of the detainment itself. Here the custodian is a third party, a stranger to the litigation who becomes enmeshed in the lawsuit solely because a party or a witness happens to be lawfully incarcerated. Indeed, if the nature of the writ does not impose on the custodian a duty to answer and the custodian is willing to relinquish custody, it makes no sense to insist, for the sake of tradition suited to the Great Writ, that the custodian be the only one who can produce the body.

The Marshal's (Br. in Op., P. 3-4) and the Court of Appeals' (Pet App. 17a) concern that this case represents merely an attempt to dip into the "deep pocket" of the United States is both exaggerated and misplaced. There is no evidence on this record of any

substantial burden, financial or otherwise, which the orders place on the Marshal. The magistrate carefully balanced the relevant factors, including any burden on the Marshal, before rejecting the Marshal's challenge. Presumably, if a substantial burden is shown in any case, the magistrate or district court will, in the proper exercise of discretion, decline to order transfer of custody.

Moreover, the deep pocket argument is particularly hollow when it is put in context. This is a case in federal court and involves the vindication of federal rights. The United States pays for the courtroom, the judge, and the clerks. Utilization of the Marshal's services hardly represents such an uncharacteristic

or unprecedented burden on the Treasury as the Marshal would have the Court believe.

Consequently, under these circumstances, it is reasonable, and consistent with the habeas corpus statute, to direct that the writ to produce the body to testify be executed by a third party such as the Marshal who is statutorily obligated "to execute all lawful writs, process and orders issued under authority of the United States." 28 U.S.C. §569(b).

2. The authority of the district courts to seek assistance from the Marshal has been recognized by four other circuits which have dealt with the issue of apportioning transportation responsibility for state prisoners who are needed to testify in federal civil rights actions. In Ballard v. Spradley,

557 F.2d 476 (5th Cir. 1977), the court of appeals affirmed a district court order which allocated to the state responsibility for the transportation of a prisoner from the state jail to the county jail near the federal courthouse and gave the Marshal the responsibility of transportation between the county jail and the federal courthouse, as well as for security during the trial. Relying on §569(b), the Ballard court stated:

> The raison d'etre of the Marshals Service is to service the federal forum in civil as well as criminal litigation. Congress has directed the Marshals may, in the discretion of the district court, where they are located, "be required to attend any sessions of court *** execute all lawful writs ... and command all necessary assistance to execute its duties." 28 U.S.C. §569(a), (b).

Id. at 481.

Similarly, in Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978), the court of appeals held that a state warden was entitled to reimbursement from the Marshal where the warden provided transportation for an inmate in a civil case. More specifically, the district court entered an order directing both the state warden and the Marshal to transport the plaintiff-inmate to federal civil proceedings in which state prison officials were named as defendants. The Marshal informed the warden that the Marshal's Office would not transport the prisoner. The state warden proceeded to transport and supervise the prisoner during trial and thereafter sought reimbursement from the Marshal for the expenses incurred. The district court denied reimbursement. The court of appeals reversed, and stated:

> We do note, however, and consider it a serious matter, that the Marshal decided that all that was necessary on his part was to notify the Warden that the Marshal's Service would not transport the prisoner. Although a motion to modify the writ had been filed, that motion had not been ruled upon at the time of trial and 28 U.S.C. §569(b) clearly required that the Marshal execute the writ. The fact that a controversy may have existed as to who should actually transport and suffer the expense of producing the prisoner had no effect upon the existing writ and did not authorize the Marshal to independently disregard a direct order of the court.

Id., at p. 407.

The Ninth Circuit also relied on 28 U.S.C.§569(b) in holding that a district court has discretion to allocate costs of compliance with a writ of habeas corpus ad testificandum issued pursuant to 28 U.S.C.§2241. Wiggins v. County of Alameda, 717 F.2d 666 (9th Cir. 1983), cert. denied sub nom, California Department of Corrections v. United States, 104 S. Ct. 1425 (1984).

Finally, in the most recent decision from an appellate court,[18] Ford v. Allen, 728 F.2d 1371 (11th Cir. 1984), the court affirmed the order of the district court which required the Marshal to bear the entire habeas corpus ad testificandum responsibility for producing a state prison inmate in federal court to testify against county employees. Each of these courts has focused on 28 U.S.C. §569(b) as the

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[18]The Eighth Circuit has presently before it an appeal from a decision of a district court in Arkansas which held that pursuant to 28 U.S.C. §2243, and absent a showing of substantial unreasonableness, the custodian state department of corrections is the only party responsible for the transportation of inmates who are the subject of a writ of habeas corpus ad testificandum issued by a federal court in a civil rights case. McGee v. Rankin, 584 F. Supp. 1202 (1984) on appeal sub nom. Arkansas Department of Corrections v. United States Marshals Service, No. 83-2128-WA (8th Cir.).

statutory basis for the district court's power to order the Marshal to undertake some or all the responsibility of producing state prisoners for civil proceedings in federal court.

To enable the Marshal to discharge his duties pursuant to §569(b), there is specific statutory authority permitting the Marshal to expend funds for the transportation of prisoners. In fashioning his order, the magistrate correctly relied on the provisions of 28 U.S.C. §567 which states:

> Under regulations prescribed by the Attorney General each United States Marshal shall be allowed --
>
> * * *
>
> (2) The expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards;

Further authority for the expenditures here in question may be found in 28 C.F.R. §0.111 which lists the general functions of the United States Marshals Service. Among the enumerated duties of the Marshal are:

> §0.111(b)
>
> The service of all civil and criminal process emanating from the federal judicial system including the executing of lawful writs and court orders pursuant to §569(b), Title 28, United States Code.
>
> §0.111(j)
>
> Receipt, processing and transportation of prisoners held in the custody of a Marshal or transported by the United States Marshals Service under cooperative or intergovernmental agreements.

The language is clear in §567(2) and the pertinent provisions of the Code of Federal Regulations: the Marshal is unequivocally authorized to expend funds

for the transportation of prisoners, whether they be federal prisoners or state prisoners in the temporary custody of the Marshal.[19]

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[19]The Marshal's own internal regulations recognize both the necessity of transferring custody of state prisoners to the Marshal and reimbursement of travel expenses to state custodians:

STATE PRISONERS

Expenses Incident to Production Prisoners In Federal Court --

If the state authorities desire to produce the requested prisoner at the place of trial under state guard, the state should advance the guard and prisoner the necessary expenses for travel. The U.S. Marshal should reimburse the state for the expenses and advance any remaining necessary allowances, all of which are to be charged to "fees and Expenses of Witness" appropriation. However, because of the excess costs involved in this procedure, the U. S. Attorney has been instructed that it would be more preferable to have the prisoner placed in the custody of the U.S. Marshal of the district in which the institution is located.

FOOTNOTE CONTINUED ON NEXT PAGE

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State prisoners in the temporary custody of the U.S. Marshal cannot be turned over to a second state requesting custody.

It is the Marshals Service's position that in Federal civil rights suits filed by state prisoners against state officials the state should transport the prisoner to and from the Federal Court and bear any of the prisoners (sic) having expenses. The Marshals Service should not reimburse the state for any of their expenses. If the Marshal is ordered to transport such prisoners, the United States Marshals Service Legal Counsel should be immediately notified.

United States Marshals Financial Management Manual, July 1, 1975, p. 340.26 (emphasis supplied).

B. The All Writs Act Authorizes An Order Against Federal Officials.

The Court of Appeals read McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821), as precluding reliance upon the All Writs Act, 28 U.S.C. §1651, for the order issued in this case, which the court construed as a writ of mandamus against federal officials. Even if the Court of Appeals correctly characterized the order as a mandamus, its conclusion was incorrect.

McIntire held only that a mandamus could not issue because the circuit courts, at that time, had not been vested by Congress with jurisdiction to decide the types of claims at issue in that case (i.e., the right to a land patent). In fact, the Court adverted to the availability of

mandamus in a proper case, noting that

> [h]ad the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act [the predecessor of 28 U.S.C. §1651] would sanction the issuing of the writ for such a purpose.

11 U.S. [7 Cranch], at 506.

McClung v. Silliman, the other case relied upon by Judge Gibbons (and the case which so troubled Judge Becker) likewise does not support the decision of the Court of Appeals. Although McClung is admittedly somewhat hard to follow, its essence is the Court's conclusion that no authority could be found for the proposition that a state tribunal had jurisdiction to issue a writ of mandamus against a federal official; such authority certainly could

not be lightly inferred when Congress had refused to delegate the power to the federal courts. Id. at 604. As the Court later had occasion to observe, "[t]he only question directly before the court [in McClung], was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 617 (1838). As such, McClung is a case resting on the sovereign immunity of federal officials which protects them from litigation in state courts.

Even if the Court of Appeals correctly interpreted McIntire and McClung, a great deal has changed since those decisions. The federal trial courts now have general federal question jurisdiction, 28 U.S.C. §1331, and the

district courts have specific statutory authority to issue writs of mandamus to federal officers and employees, 28 U.S.C. §1361. If anything, McIntire and McClung today stand only for the proposition that the All Writs Act permits federal, but perhaps not state, courts to issue writs in the nature of mandamus against federal officials if the case otherwise is within the court's jurisdiction. This civil rights action being properly within the District Court's jurisdiction, its ancillary order to the Marshal was authorized by law.

CONCLUSION

On the basis of the foregoing arguments and authorities, petitioner respectfully requests that the decision of the Court of Appeals be reversed and that the order of the magistrate be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PENNSYLVANIA BUREAU OF CORRECTION, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the magistrate erred in requiring the United States Marshals Service to transport state prisoners to the federal courthouse to testify in an action brought by one of the state prisoners against county officials under 42 U.S.C. 1983.

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-45a) is reported at 737 F.2d 1283. The opinions of the magistrate (Pet. App. 46a-64a; J.A. 22a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on June 27, 1984. The petition for a writ of certiorari was filed on September 24, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2241 provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (5) It is necessary to bring him into court to testify or for trial.

2. 28 U.S.C. 2243 provides in pertinent part:

> The writ * * * shall be directed to the person having custody of the person detained.
>
> * * * * *
>
> [The] person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

3. 28 U.S.C. 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

4. 28 U.S.C. 567 provides in pertinent part:

> Under regulations prescribed by the Attorney General, each United States marshal shall be allowed—
>
> (2) the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards * * *.

5. 28 U.S.C. 569 provides in pertinent part:

> (a) The United States marshal of each district is the marshal of the district court * * * and may, in the discretion of the respective courts, be required to attend any session of court.
>
> (b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, * * * and command all necessary assistance to execute their duties.

(c) The Attorney General shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys. Each marshal shall report his official proceedings, receipts and disbursements and the condition of his office as the Attorney General directs.

STATEMENT

1. In June 1980, Richard Garland brought suit under 42 U.S.C. 1983 against various Philadelphia County officials in the United States District Court for the Eastern District of Pennsylvania. In his complaint, Garland alleged that, while in state custody on April 23, 1980, he had been beaten and harassed by the defendant deputy sheriffs and prison guards because he was a member of the John Africa MOVE organization in Philadelphia. Garland contended that the alleged incidents violated his constitutional rights, and he sought $3 million in damages. See J.A. 9a-19a.

With the consent of the parties, the district court assigned the action to a magistrate for disposition on the merits pursuant to 28 U.S.C. 636(c)(1). See J.A. 22a n.1. The magistrate granted Garland's application to proceed in forma pauperis (see J.A. 20a-21a; Order of June 18, 1980).

2. At the time this lawsuit was initiated, Garland was confined in the Philadelphia County jail; petitioner Pennsylvania Bureau of Correction subsequently transferred him to a state prison. See Pet. Br. 6 n.2. In 1981, the magistrate ordered that the warden of the state facility produce Garland in court for conferences in the case (see Orders of Jan. 28 and Mar. 16, 1981), and petitioner intervened to argue that the United States Marshals Service rather than the State must bear the responsibility for producing Garland in court (see C.A. App. 12-22).

In December 1982, the magistrate, acting upon Garland's petition (see C.A. App. 23-38), granted writs of habeas corpus ad testificandum for the production at trial

of Garland and four other state prisoners whom Garland identified as proposed witnesses (see J.A. 22a-41a). The writs were addressed to the state custodians of these prisoners and to the United States Marshal; they required that the state prison officials transport the five state inmates from their institutions of confinement to the county jail nearest the federal courthouse in Philadelphia and that the United States Marshal transport the inmates from the county jail to the federal court and maintain custody of them during the trial (*id.* at 35a, 36a-41a).

The Marshal intervened and moved for reconsideration of that portion of the magistrate's order that directed him to transport the state prisoners from the county jail to the federal courthouse and guard them during trial (see C.A. App. 50-58). On February 10, 1983, the magistrate denied the motion to reconsider (Pet. App. 46a-65a). The magistrate acknowledged that the historical practice in the Eastern District of Pennsylvania was that the Marshal was not responsible for the transportation of state prisoners in connection with private civil rights actions (*id.* at 48a, 50a-51a, 56a, 58a). Nevertheless, the magistrate concluded that 28 U.S.C. 569(b) authorized him, in issuing a writ of habeas corpus ad testificandum, to require the Marshal to take custody over state prisoners outside the federal courthouse and to transport them to court (Pet. App. 51a-65a).

3. On the Marshal's appeal from the denial of reconsideration,[1] the court of appeals reversed in part and affirmed in part (Pet. App. 4a-45a).[2] Relying on its

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[1] Petitioner did not appeal the portion of the magistrate's order requiring it to transport the state inmates from prison to the local jail.

[2] Because the case had been referred to the magistrate for trial by the consent of the parties, appellate review lay directly in the court of appeals rather than in the district court. See 28 U.S.C. 636(c)(3). Since the magistrate's order to the United States Marshal was collateral to the merits of the underlying civil rights

earlier decision in *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982), the court of appeals held that district courts (and therefore magistrates) have no general statutory authority to impose upon a non-custodian the obligation to produce a prisoner in court pursuant to a writ of habeas corpus ad testificandum, and thus the Marshal cannot ordinarily be required to transport state prisoners from state or county facilities to the federal courthouse. It also held that, as part of his responsibility for courthouse security, the Marshal could be ordered to take custody over state prisoners while they are in the federal court. Finally, the court of appeals held that, incident to that security responsibility, the Marshal could be directed to take custody of state prisoners outside the federal courthouse and transport them to court if the trial judge "makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal courthouse" (Pet. App. 22a-23a). Since there was no general statutory authority to require the Marshal to transport state prisoners, and since the magistrate had made no finding of special security circumstances in this case, the court of appeals reversed the magistrate's order insofar as it obligated

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action and fully and finally disposed of the issue concerning transportation of the state prisoners, the court of appeals held that it had jurisdiction over the appeal pursuant to the collateral order doctrine (Pet. App. 8a-9a). Accord *United States Marshals Service* v. *Means*, 724 F.2d 642, 644-645 (1983), on reh'g en banc, 741 F.2d 1053, 1055 (8th Cir. 1984); *Wiggins* v. *County of Alameda*, 717 F.2d 466, 467-468 (9th Cir. 1983), cert. denied *sub nom. California Dep't of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984); *Story* v. *Robinson*, 689 F.2d 1176, 1177-1178 (3d Cir. 1982); *Ford* v. *Carballo*, 577 F.2d 404, 405 (7th Cir. 1978); *Ballard* v. *Spradley*, 557 F.2d 476, 479 (5th Cir. 1977).

We are advised that further proceedings on Garland's civil rights action have been stayed pending resolution of the issue of compliance with the writs of habeas corpus ad testificandum.

the Marshal to assume custody of the state prisoners outside the courthouse and transport them to court.[3]

SUMMARY OF ARGUMENT

Under settled principles, it is the obligation of the custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum. Such was the custodian's duty at common law, and it is continued by the express terms of the federal habeas corpus statute. Where a district court properly concludes that the burden and security problems involved in the production are outweighed by the need for a prisoner's appearance, the custodian must comply with the writ by bringing the prisoner to court. This responsibility is justified by the public duty—borne by all in furtherance of the overriding societal interest in an effective system of justice—to provide evidence in one's possession regardless of expense or inconvenience.

Without disputing these principles, petitioner contends that the magistrate has authority to relieve it of the custodian's traditional obligation of production and to shift that responsibility to the United States Marshals Service. However, the federal government is a stranger to this litigation; it does not have custody of the prisoners and is not involved in the underlying civil rights action in which the prisoners' testimony is sought. There is no basis to impose upon the United States the duty to assist the State in transporting state prisoners in connection with a lawsuit under 42 U.S.C. 1983 against officials of a county of the State for acts done under color of state law.

In effect, petitioner's argument is an attempt to exploit the "deep pocket" of the United States. The issue raised presents a controversy between the State and the federal government over the operation of the Marshals

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[3] The Marshal has not cross-petitioned on the security issues, and therefore those issues are not before the Court.

Service and the expenditure of federal funds for the transportation of state prisoners. In light of principles of federal sovereign immunity and separation of powers, the requisite authority for the order sought by petitioner must be clearly expressed before a court may grant such relief against the Executive Branch.

Contrary to petitioner's contention, the All Writs Act does not authorize the magistrate to require the Marshal rather than the state custodian to transport state prisoners in this case. The Act allows a court to utilize a writ not provided for by statute if its issuance is necessary or appropriate to the exercise of the court's jurisdiction and agreeable with the principles and usages of law. As illustrated by the cases upon which petitioner relies, the Act is a residual source of authority for courts to fill in procedural interstices not covered by specific provisions. Where a legal rule or doctrine specifically addresses the matter, however, it is controlling, and the general All Writs Act cannot be used to circumvent or contravene otherwise applicable legal requirements. This limitation is especially appropriate here, since the Judiciary Act of 1789 codified in the same section the ad testificandum writ and the all writs provision for "other writs not specially provided for by statute." Because the writ of habeas corpus ad testificandum constitutes the established means for obtaining the presence of a prisoner in court, the All Writs Act is not properly invoked in this case to displace that traditional form of process.

Likewise, the statute governing the Marshals Service does not authorize the magistrate to direct the Marshal to undertake the transportation of state prisoners. Neither the section providing for the Marshal to execute lawful judicial process, nor the section allowing the Marshal to use appropriated federal funds for transporting prisoners, is applicable here. Those provisions do not themselves confer authority on the courts to compel the Marshal to act, but rather come into play

only where there is an independent source of such authority. In the absence of some other legal basis for imposing the transportation duty on the Marshal, these provisions are inapposite and do not support the magistrate's order. Indeed, the Marshals Service, in its regulations and operating manuals, has specifically concluded that the state and not the Marshal is responsible for the production of state prisoners in the circumstances of this case, and the Service's interpretation of its own authority should be given substantial deference.

Accordingly, the obligation to produce the requested state prisoners in court rests on petitioner as their custodian and cannot be shifted to the Marshal. However, while the expenses of complying with this obligation would fall on petitioner in the first instance, it is possible that the parties to the underlying civil rights action may be required to provide reimbursement to petitioner for those expenses. Although resolution of this issue is not necessary for the Court's disposition of the question presented here, we outline our preliminary analysis of this matter to make clear that rejection of petitioner's position does not mean that it will ultimately have to bear the costs of production.

ARGUMENT

PETITIONER'S OBLIGATION AS THE CUSTODIAN TO PRODUCE STATE PRISONERS IN COURT PURSUANT TO A WRIT OF HABEAS CORPUS AD TESTIFICANDUM CANNOT BE SHIFTED TO THE UNITED STATES MARSHALS SERVICE

The issue in this case is whether the United States Marshals Service can be required to transport state prisoners to court pursuant to a writ of habeas corpus ad testificandum in an action under 42 U.S.C. 1983. Relying on the fact that it is not a party to the underlying civil rights suit, petitioner contends that the magistrate has authority to relieve it of the traditional respon-

sibility of a custodian for producing its prisoners in court and to impose that obligation on the federal government rather than the State.

However, the duty of bringing prisoners to court pursuant to the writ ad testificandum devolves upon the custodian not because of its relation to the lawsuit in which the prisoners' testimony is sought, but because of its control over those in its confinement. The fact that State officials are not parties to the litigation does not detract from the established requirement that the State custodian comply with the ad testificandum writ. Contrary to petitioner's formulation, analysis of the question presented in this case does not depend upon the fortuity that a State official is a party.[4]

Nor is it correct that the State is, as petitioner seeks to portray it, a stranger to the underlying Section 1983 action. That litigation concerns charges by a state prisoner against officials of a county of the State for acts done under color of state law. Moreover, the State has a penal interest in the continued incarceration of the plaintiff and those of his witnesses who are state prisoners. Although state officials are not party defendants, the State can scarcely be considered to be a disinterested and remote bystander.

Rather, it is the United States that is the true stranger to the proceeding. The federal government neither is the custodian of the prisoners in question nor has any involvement in the civil rights suit. Its only relation to this case is that the plaintiff filed his complaint in federal court. But the action could equally well have been brought in state court (see *Maine* v. *Thiboutot*, 448

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[4] Moreover, in a number of cases involving this issue, state officials in fact were defendants in the civil rights action. See *Story* v. *Robinson*, 689 F.2d 1176 (3d Cir. 1982); *Ford* v. *Carballo*, 577 F.2d 404 (7th Cir. 1978); *Ballard* v. *Spradley*, 557 F.2d 476 (5th Cir. 1977).

U.S. 1, 3 n.1 (1980)), in which event it would be frivolous to argue that the United States has any obligation to participate in transporting state prisoners. That Congress has provided a forum for the resolution of disputes under 42 U.S.C. 1983 should hardly subject the United States to the duty of assisting the State in transporting state prisoners in connection with a lawsuit to which the federal government is not a party. The obligation to produce its prisoners in court pursuant to the ad testificandum writ rests on petitioner as the custodian, not on the United States Marshals Service.

A. As The Custodian, The State Is Required To Produce A State Prisoner In Court Pursuant To A Writ Of Habeas Corpus Ad Testificandum

As the Court has recognized, habeas corpus encompasses a number of different forms of writs that each serve a specific function. See *Carbo* v. *United States*, 364 U.S. 611, 614-615 (1961); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95-98 (1807) (Marshall, C.J.). Involved in this case is the writ of habeas corpus ad testificandum —literally, "you have the body to testify." *Black's Law Dictionary* 639 (5th ed. 1979).

At common law, the writ of habeas corpus ad testificandum was used " 'to remove a prisoner, in order to * * * bear testimony, in any court * * *.' " *Ex parte Bollman*, 8 U.S. (4 Cranch) at 98, quoting 3 W. Blackstone, *Commentaries* *129. "This writ is a command of the court directing the person having custody of the person to bring the prisoner before the court for the purpose of testifying." 4A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 30.56, at 30-82 to 30-83 (2d ed. 1983) (footnote omitted); see also, *e.g.*, *Gilmore* v. *United States*, 129 F.2d 199, 202 (10th Cir.), cert. denied, 317 U.S. 631 (1942) ("[i]ts object is to direct the custodian of a desired witness who is incarcerated to bring such witness into court to give testimony").

The purpose of this common law writ was

> analogous to that sought to be attained by directing a subpoena duces tecum to the custodian of an evidential document * * *. "If the desired witness is confined in jail * * * [, however,] a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him. Accordingly a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony."

In re Thaw, 166 F. 71, 74-75 (3d Cir. 1908); see also 8 *Wigmore on Evidence* § 2199 (McNaughton rev. ed. 1961).

The common law writ of habeas corpus ad testificandum was codified in Section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 81-82, which provided for issuance of the writ with respect "to prisoners in gaol * * * where they * * * are necessary to be brought into court to testify." See *Ex parte Bollman*, 8 U.S. (4 Cranch) at 94, 99; *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Statutory authorization for the ad testificandum writ has existed since that time, and the current habeas corpus statute provides that the writ shall "extend to a prisoner * * * [where i]t is necessary to bring him into court to testify * * *." 28 U.S.C. 2241(c)(5). See *United States* v. *Mauro*, 436 U.S. 340, 357 (1978); *Barber* v. *Page*, 390 U.S. 719, 724 (1968).

In line with its common law antecedents, the habeas corpus statute states that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. 2243. In addition, it specifically provides that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." *Ibid.* Thus, the plain language of the habeas corpus statute recognizes the mandatory and nondelegable duty of the custodian to bring its prisoners to court. See also Fed. R. Civ. P. 81(a)(2) ("[t]he writ of habeas corpus * * * shall be directed to the person having custody of the person detained * * *");

Fed. R. Crim. P. 15(b) (with respect to a deposition in a criminal case, "[t]he officer having custody of a defendant shall * * * produce him at the examination * * *").[5]

Issuance of a writ of habeas corpus ad testificandum is in the discretion of the trial court. See, *e.g.*, *Pollard* v. *White*, 738 F.2d 1124, 1125 (11th Cir. 1984), cert. denied, No. 84-5420 (Jan. 7, 1985); *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 246 (5th Cir. 1984); *Jerry* v. *Francisco*, 632 F.2d 252, 255-256 (3d Cir. 1980); see also *Price* v. *Johnston*, 334 U.S. 266, 284-285 (1948). As these cases indicate, among the factors to be considered are the relevance and importance of the testimony to the litigation, the necessity to present the evidence in the form of live testimony rather than through an alternative method such as deposition or affidavit, and the expense, inconvenience, and possible danger or security risk that would be involved in transporting and guarding the prisoner. A writ ad testificandum will not be issued for prisoners whose presence would be unduly burdensome or dangerous, whose evidence would not be significant to the resolution of the lawsuit, or whose testimony would be cumulative and repetitive.[6]

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[5] As the 1974 advisory committee note to Fed. R. Crim. P. 15 explains:

> In [Rule 15(b)] reference is made to the defendant in custody. If he is in state custody, a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) may be required to accomplish his presence.

See also Fed. R. Crim. P. 15(c) and 1974 advisory committee note (in deposition by government or indigent defendant, government may be ordered to pay expense of travel and subsistence for a defendant *not* in custody and his attorney).

[6] In a related context, the Court has noted that bringing a prisoner to court involves "opportunities for escape afforded by travel, the cost of transportation, * * * [and] administrative burden." *Ahrens* v. *Clark*, 335 U.S. 188, 191 (1948). See also *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 496 (1973). Moreover, requests for a writ frequently represent nothing "more than a mere desire to be freed temporarily from the confines of the prison."

Where a trial court properly concludes that the burden of producing the prisoner is outweighed by the need for the prisoner's appearance, the custodian must comply with the writ by bringing the prisoner from his place of confinement to the courthouse. This duty is justified by "the longstanding principle that 'the . . . public has a right to every man's evidence.'" *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (citations omitted). "It is beyond dispute that there is in fact a public obligation to provide evidence * * * and that this obligation persists no matter how financially burdensome it may be." *Hurtado* v. *United States*, 410 U.S. 578, 589 (1973) (footnote omitted). The expense incurred by the custodian in making available evidence in its possession—here, the prisoner himself—represents a responsibility that is indispensable to our system of justice; it is neither more nor less than a "'necessary contribution * * * to the welfare of the public.'" *Ibid.* (citation omitted). Especially given the custodian's penal interest in the confinement of the prisoner, there is nothing unfair or inappropriate in charging the custodian with this commitment.

In light of the theory of the writ, its common law origins, and the plain language of 28 U.S.C. 2243, it is clear that a writ of habeas corpus ad testificandum is

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Price v. *Johnston*, 334 U.S. at 284-285 (footnote omitted). Thus, even if the underlying lawsuit is unsuccessful, the prisoners "will nonetheless have obtained a short sabbatical in the nearest federal courthouse. * * * '[T]emporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.'" *Cruz* v. *Beto*, 405 U.S. 319, 327 & n.8 (1972) (Rehnquist, J., dissenting) (citation omitted). It also cannot be ignored that civil rights suits by prisoners often reflect the "fantasy which has its basis in the paranoia of prison rather than in fact" (*Harris* v. *Nelson*, 394 U.S. 286, 300 (1969)) and can be motivated by "[a] desire to harass officials, a hope for a quick windfall by way of nuisance settlement, or simply a discovery of a new way to pass the monotonous hours of incarceration." *Urbano* v. *Sondern*, 41 F.R.D. 355, 358 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966), cert. denied, 386 U.S. 1034 (1967).

properly addressed to the custodian of a prisoner and that the custodian is obligated to produce the prisoner in court pursuant to the writ. See *McGee* v. *Rankin*, 584 F. Supp. 1202, 1205 (W.D. Ark. 1984), appeal pending *sub nom. Arkansas Dep't of Corrections* v. *United States Marshals Service*, No. 83-3138-WA (8th Cir.). Here, petitioner does not contend that a state is immune from a federal writ of habeas corpus ad testificandum for a witness in its custody. Cf. *Hutto* v. *Finney*, 437 U.S. 678, 695-696 & n.24 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974); *Fairmont Co.* v. *Minnesota*, 275 U.S. 70, 74 (1927). Nor does it contend that the writs in this case were erroneously issued.

However, relying on *Carbo* v. *United States*, *supra*, petitioner does suggest (Pet. Br. 30-36) that the provisions in 28 U.S.C. 2243 that direct the custodian to produce the prisoner in court do not apply to the ad testificandum writ and are limited to the writ of habeas corpus ad subjiciendum—the "Great Writ" that is used to release a prisoner from unlawful custody (see *Carbo*, 364 U.S. at 614-615). Historically, the relevant language was first adopted in the Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-386, which authorized federal courts to grant writs of habeas corpus ad subjiciendum on behalf of state prisoners restrained in violation of the Constitution or laws of the United States. See, *e.g.*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 1425 (2d ed. 1973). In the statutory recodification of 1875, these provisions were integrated into the Judicial Code without restriction and applied to all forms of the writ of habeas corpus. Rev. Stat. §§ 755, 758 (1875 ed.). This structure was preserved in the 1948 recodification that is now contained in 28 U.S.C. 2243. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 965. See generally *Carbo*, 364 U.S. at 615-619.

Contrary to petitioner's suggestion, this history does not indicate that the writ of habeas corpus ad testi-

ficandum is not properly directed to the custodian. Indeed, the very purpose of the writ is to produce the incarcerated prisoner in court, and it is the custodian—and only the custodian—that, by virtue of its control over the body of the prisoner, has the authority to comply with the order. Moreover, the common law imposed on the custodian the duty to bring the prisoner into court pursuant to the writ ad testificandum, and petitioner does not argue that the provisions in Section 2243 were intended fundamentally to alter the nature and operation of the writ. The statutory language is consistent with the basic rationale and common law requirements of the writ, and there is simply no basis in the historical development of the statute to infer that it should be read, as petitioner urges, in a way that is irreconcilably at odds with its terms, purpose, and common law roots. See *Hart and Wechsler's The Federal Courts and the Federal System*, *supra*, at 1425 (the 1867 Act "prescribed the procedure on the writ * * * [which] in terms later applied to all cases of its use * * *").

Nor does this Court's decision in *Carbo* compel a different conclusion. In *Carbo*, the Court held that the provision that "[w]rits of habeas corpus may be granted by * * * [courts] within their respective jurisdictions" (28 U.S.C. 2241(a)) imposes a territorial limitation on the issuance of the Great Writ but not on the writ of habeas corpus ad prosequendum. In reaching this result, the Court found from the history of the habeas corpus statute that the territorial limitation was intended to apply exclusively to the Great Writ (364 U.S. at 615-619), that the statute specifically so provided until the 1948 recodification, which did not change prior law (*id.* at 618-619), and that this construction of the statute was consistent with longstanding procedures and common law requirements applicable to the writ ad prosequendum (*id.* at 620). Thus, in *Carbo*, the Court concluded that the congressional development and common law background of the habeas corpus act provided affirmative evi-

dence that the literal language of the statute should not be understood to restrict the availability of the writ ad prosequendum. Here, on the other hand, the language of 28 U.S.C. 2243 is in full accord with the purpose and common law requirements of the writ ad testificandum. Surely nothing in *Carbo* forecloses the conclusion that—consistently with the text of Section 2243 and the rationale and common law operation of the writ—it is the custodian of the prisoner that is required to comply with the writ of habeas corpus ad testificandum.

In view of the foregoing, the writs ad testificandum in this case were properly addressed to petitioner as the custodian of the prisoners in question, and petitioner was obligated to produce the prisoners in court pursuant to the writs. The sole question presented here is whether the magistrate erred in relieving petitioner of that lawful obligation by imposing it instead on the federal government. For the reasons to be discussed in Part B, the magistrate had no authority to shift the responsibility of production to the United States.

However, while petitioner has the duty to comply with the writs by producing the prisoners in court, that does not mean it must ultimately bear the expense of that production. Rather, as we shall outline in Part C, it is possible that at least a portion of that cost should be defrayed by the parties in the underlying civil rights litigation for which the testimony of the prisoners is sought. Regardless of any such allocation, though, there is no legal basis for requiring the federal government rather than petitioner to comply with the writs in the first instance by bringing the prisoners to court.

B. The Magistrate Lacks Authority To Shift From Petitioner To The Federal Government The Obligation Of Bringing State Prisoners To Court

In an effort to avail itself of the "deep pocket" of the United States (Pet. App. 9a), petitioner seeks to avoid its traditional obligation of complying with the writ of

habeas corpus ad testificandum and to shift to the federal government the responsibility for transporting state prisoners to court. As Judge Gibbons noted in the lead opinion below (*id.* at 10a), "[a]bsent statutory authorization, what [petitioner] proposes is a raid in its interest on the United States Treasury."

The question of the authority of the magistrate to impose this obligation on the United States Marshals Service must be analyzed in light of general principles of sovereign immunity and separation of powers. The issue before the Court involves a controversy between petitioner and the federal government over the proper functioning of the Marshals Service and the payment of the costs of transporting state prisoners. Under principles of sovereign immunity, however, petitioner cannot resort to the courts to obtain a judgment that either would " 'interfere with the public administration' " of the federal government and " 'compel it to act' " or would " 'expend itself on the public treasury.' " *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citations omitted). *See* also, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 10-11 & n.11; *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963).[7] Nor can these principles be avoided by the expedient of requesting otherwise proscribed relief against the United States incident to an underlying lawsuit to which the government is not a party.[8]

Similarly, under the doctrine of separation of powers, the judiciary does not have a roving commission to order the Executive Branch to provide assistance to private litigants in federal court or otherwise to act in accordance

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[7] Of course, states, like other litigants, are subject to the principles of federal sovereign immunity. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983).

[8] Indeed, it is the fact that the instant dispute between petitioner and the federal government is entirely collateral to the underlying litigation that renders the magistrate's order appealable under the "collateral order" doctrine. See pages 4-5 note 2, *supra*.

with a judge's conception of desirable social policy.[9] Such an order would improperly intrude on the operations of a co-ordinate branch of government and, in the circumstances of this case, would constitute an undeniable attempt to require the expenditure of federal funds in lieu of state outlays. While Congress undoubtedly has the power to prescribe the duties of the Marshals Service (see, *e.g.*, 28 U.S.C. 569), a court cannot levy responsibilities on the Marshal in the absence of affirmative legal authorization. As explained in the lead opinion in the court of appeals (Pet. App. 17a), there is no basis to "permit district courts to impose the expenses of litigation upon the Treasury of the United States whenever that seemed to the court to be a good idea. Both common sense and appropriate concern for separation of powers caution against such an arrogation of judicial power."

In view of these considerations, we submit that a clearly expressed source of authority is necessary for the magistrate to order the Marshal to transport state prisoners. See, *e.g.*, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983). It is not enough that no provision of law prohibits the Marshal from transporting state prisoners; rather, there must be affirmative authorization for the magistrate's directive to the Marshal. See, *e.g.*, *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). As we now discuss, neither of the provisions upon which petitioner relies—the All Writs Act (28 U.S.C. 1651) and the Marshals statute (28 U.S.C. 567, 569)—suffices to carry its burden of showing the existence of the requisite authority.

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[9] There can be no doubt that the Marshals Service is within the Executive Branch of the federal government. See Pet. App. 38a-39a (Becker, J., concurring). The United States Marshal for each district is appointed by the President (see 28 U.S.C. 561(a)), is subject to the supervision and direction of the Attorney General (see, *e.g.*, 28 U.S.C. 561(c), 562, 567, 569(c), 571(a) and (d)), and is funded through Department of Justice appropriations (see, *e.g.*, 28 U.S.C. 567; Pub. L. No. 98-411, 98 Stat. 1554.

1. *The All Writs Act Does Not Authorize The Magistrate To Require The Marshal Rather Than The State To Transport State Prisoners To Court*

As authority for the magistrate's order, petitioner places principal reliance on the All Writs Act (28 U.S.C. 1651).[10] In essence, petitioner asserts that the All Writs Act can be used to obviate the established obligations of the custodian under an ad testificandum writ by imposing on the United States Marshals Service, as a non-party to the underlying litigation, the responsibility for producing state prisoners in court. Petitioner's assertion is unsound and is unsupported by either common sense or legal precedent.[11]

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[10] As petitioner concedes (Pet. Br. 29 n.15), the magistrate did not rely on the All Writs Act in issuing his order (see Pet. App. 51a-52a). Moreover, in neither the trial court nor the court of appeals did petitioner invoke the All Writs Act as a source of statutory authority for the magistrate's order (see Pet. App. 13a, 15a).

[11] Petitioner does not identify the nature of the writ that it contends is authorized by the All Writs Act. It would not appear to be in the nature of a writ of habeas corpus, since it is not, as those writs require, addressed to the person who has custody of the body. Moreover, since there is no mandatory duty on the part of the Marshal to transport state prisoners, the writ would not be in the nature of mandamus. See, *e.g.*, *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 13; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958); *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420 (1931). Additionally, because mandamus will lie only where there is no alternative remedy (see, *e.g.*, *Heckler* v. *Ringer*, slip op. 13; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)), it would not be available here in light of the ad testificandum writ for bringing the state prisoners to court. In these circumstances, there is no occasion to consider the issue, discussed by petitioner (Pet. Br. 48-50) and by the court below (Pet. App. 16a-17a, 32a-37a), whether an otherwise appropriate writ of mandamus would be barred by *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 504 (1813), and *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821). See, *e.g.*, 28 U.S.C. 1361; *Stafford* v. *Briggs*, 444 U.S. 527, 533-534 (1980); *In re Blake*, 175 U.S. 114, 119-120 (1899); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 615, 617 (1838).

Contrary to petitioner's argument, the courts have recognized that the All Writs Act cannot be applied in ways that circumvent or contravene established legal requirements. For example, in *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 397, 401-402 (1982), this Court held that the All Writs Act did not authorize the imposition of the costs of a remedial civil rights decree on parties that were not subject to such relief under traditional standards; emphasizing that these entities "could not be held liable to any sort of injunctive relief based on their own conduct" (458 U.S. at 402), the Court concluded that the "obligations [ordered by the district court] can be imposed neither under traditional equitable authority * * * nor under the All Writ Act" (*ibid.*) (footnote omitted). See also, *e.g.*, *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980) (mandamus under All Writs Act cannot be employed to avoid final judgment rule). Likewise, the courts of appeals have rejected such a use of the Act. See, *e.g.*, *Florida Medical Ass'n* v. *HEW*, 601 F.2d 199 (5th Cir. 1979); *Ben David* v. *Travisono*, 495 F.2d 562 (1st Cir. 1974). As the court explained in *Florida Medical Ass'n* (601 F.2d at 202), the All Writs Act does not "empower a district court to abandon the [Federal Rules of Civil Procedure] * * * * * [or] to promulgate an *ad hoc* procedural code whenever compliance with the *Rules* proves inconvenient."

This principle is consistent with the language and origin of the All Writs Act. The Act derives from Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82, which provided that

> all the * * * courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

In subsequent enactments, the provisions for writs of habeas corpus and for all other writs were codified in

separate sections (see *Carbo*, 364 U.S. at 615-616, 617-618) and are now found respectively in 28 U.S.C. 2241 *et seq.* and 28 U.S.C. 1651. The original phrase "not specially provided for by statute" remained in the all writs section until the 1948 recodification of the Judicial Code, which consolidated various provisions into Section 1651 and made "necessary changes in phraseology" but without substantive amendment. See H.R. Rep. 308, 80th Cong., 1st Sess. A144 (1947); see also *id.* at 5. Likewise, the 1948 revision clarified, as had previously been held (see *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942)), that the writ must be necessary "or appropriate" for the exercise of a court's jurisdiction.

In light of its history and evident purpose, the All Writs Act is correctly seen to be a residual source of authority to issue appropriate writs that are not otherwise covered by law. Where a legal rule or doctrine specifically addresses the particular question under consideration, it is that authority, and not the general All Writs Act, that is applicable and controlling. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). In this way, the All Writs Act is properly restricted, in the words of the first Judiciary Act, to "other writs not specially provided for by statute." Here, the writ of habeas corpus ad testificandum affords a specific and historically utilized means of obtaining the presence of a prisoner in court, and the residual All Writs Act cannot be invoked to displace that established form of process.

Indeed, this limitation on the scope of the All Writs Act is especially appropriate in cases involving the writ of habeas corpus ad testificandum. Given that the Judiciary Act of 1789 initially codified the ad testificandum writ in the same section as the all writs provision, the general authorization to issue "other writs not specially provided for by statute" cannot be understood to allow the circumvention of that traditional writ. Any other interpretation would torture the meaning of the Judiciary Act and render it internally inconsistent.

Moreover, the All Writs Act provides that the issuance of such other writs be agreeable to the principles and usages of law and necessary or appropriate for the exercise of the court's jurisdiction. Whatever other limitations may be imposed by these provisions, they clearly foreclose the use of the Act to evade or defeat the established legal requirements for the writ of habeas corpus ad testificandum. Invocation of the All Writs Act to that end would ignore rather than further the salutary purposes of the statute.

The cases cited by petitioner do not support its argument that, under the All Writs Act, a court may shift from petitioner to the non-party Marshal the traditional obligation of the custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum. Petitioner first relies (Pet. Br. 19-25) on *Price* v. *Johnston*, 334 U.S. 266 (1948), and *Harris* v. *Nelson*, 394 U.S. 286 (1969). In *Price*, the Court ruled that the All Writs Act authorized the issuance of an order to require the custodian to bring a prisoner to court to present oral argument on his appeal from the denial of a petition for a writ of habeas corpus. In *Harris*, the Court held that the All Writs Act authorized a court to provide for discovery by the parties in a habeas corpus proceeding.

Notwithstanding petitioner's argument, the issues in those cases stand in marked contrast to the present controversy. Initially, we note that the writs in *Price* and *Harris* ran against a party in the proceeding. Those cases did not consider the application of the All Writs Act to a stranger to the underlying litigation.

Furthermore, no other legal rule or doctrine addressed the issues raised in those cases, and the All Writs Act was the only means available to implement the given procedure in order to facilitate the proper disposition of the lawsuit. In *Price* there was no alternative method to bring the prisoner to court for oral argument (or, since the prisoner was not represented by counsel, for hearing argument on his behalf at all), while in *Harris* no

other mechanism existed for taking discovery in a habeas corpus case. Here, on the other hand, courts have a traditional form of process—the writ ad testificandum—for obtaining the presence of a prisoner, and thus resort to the All Writs Act is not, as the statute requires, either necessary and appropriate or confined to orders not otherwise provided for by law.

Likewise, the writs in *Price* and *Harris* were consistent with other principles of law and did not circumvent established legal requirements. In *Price*, while no form of the writ of habeas corpus had traditionally served to bring a prisoner to court for oral argument, such use of the All Writs Act was in accord with the fundamental nature of the habeas corpus writ "to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause" (334 U.S. at 283); in *Harris*, although the discovery provisions in the Federal Rules of Civil Procedure were not directly applicable in habeas corpus proceedings, use of the All Writs Act to provide for discovery was consistent both with the procedures under the Rules and with the recognized power of a court to develop the facts relevant to the disposition of the cause before it (394 U.S. at 299-300). In the instant case, however, petitioner invokes the All Writs Act in contravention of the established requirements of the writ ad testificandum and thereby seeks to avoid its traditional obligations as custodian of the prisoners in question.

For much the same reasons, petitioner's position is also not supported by the decision in *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977), in which the Court upheld an order under the All Writs Act requiring the telephone company to provide assistance to the government in utilizing a pen register. First, contrary to petitioner's fundamental assumption, *New York Telephone* does not sanction the use of the All Writs Act whenever the issuance of a writ would not impose an unreasonable burden. Rather, the Court merely recognized

(434 U.S. at 171-172) that a writ otherwise authorized by the statute would be improper if it resulted in an unreasonable burden.

Moreover, the subject of the writ in *New York Telephone* was a private corporation, not the federal government, and therefore that case raised none of the considerations of sovereign immunity and separation of powers that are applicable in the present case. In fact, the telephone company was "a highly regulated public utility with a duty to serve the public" (434 U.S. at 174 (footnote omitted)), and it regularly employed pen registers for its own business purposes (*id.* at 174-175). And the company was to "be fully reimbursed at prevailing rates, and compliance with [the court's order] required minimal effort on * * * [its] part * * * and no disruption to its operations." *Id.* at 175; see also *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 401. Here, in contrast, no provision of the magistrate's order requires petitioner to reimburse the Marshal or ensures that the transporting of state prisoners would not interfere with the Marshal's statutory responsibilities.

In addition, in *New York Telephone* the issuance of the writ was "necessary" (434 U.S. at 161) to "effectuate and prevent the frustration of orders [the district court] has previously issued" (*id.* at 172). As the Court repeatedly emphasized, implementation of the district court's pen-register order would not have been possible absent the assistance of the telephone company (see *id.* at 164 n.4, 172, 174, 175 & n.23; see also *General Building Contractors Ass'n*, 458 U.S. at 401); "without the [c]ompany's assistance there is no conceivable way in which the surveillance authorized by the [d]istrict [c]ourt could have been successfully accomplished" (434 U.S. at 175 (footnote omitted)). In this case, on the other hand, it was not necessary or appropriate to direct the Marshal to transport state prisoners in order to safeguard the trial court's processes, since petitioner as the custodian of the prisoners could be required to produce them pursuant to a writ of habeas corpus ad testificandum.

Finally, in *New York Telephone* the All Writs Act was the exclusive source of authority that existed for obtaining the assistance of the telephone company. Accordingly, issuance of the writ was not inconsistent with or in circumvention of established legal requirements. Indeed, the Court noted that use of the writ was in accordance with both the duty of citizens to provide needed aid to law enforcement officials (434 U.S. at 175-176 n.24) and the intent of Congress in the area of electronic surveillance and pen registers (*id.* at 176-178). Nothing in *New York Telephone* authorizes the All Writs Act to be used, as petitioner seeks, to evade writs of habeas corpus ad testificandum under 28 U.S.C. 2241 and shift from the state custodian to the federal government the obligation of producing state prisoners in court.

2. *The Statute Governing The Marshals Service Does Not Authorize The Magistrate To Require The Marshal To Transport State Prisoners To Court*

Petitioner further argues that the statute governing the Marshals Service authorizes the magistrate to require the Marshal to transport the state prisoners in this case. Petitioner relies on 28 U.S.C. 569(b), which provides that "United States marshals shall execute all lawful writs, process and orders issued under authority of the United States * * *." [12] As the court below correctly recognized, however, Section 569(b) is "not a separate source of judicial authority to issue writs, process and orders, but only a source of the Marshals' duty to execute them when they have been issued pursuant to some other source of authority" (Pet. App. 11a; see also *id.* at 25a n.2 (Becker, J., concurring)).

If petitioner's reading of the statute were correct, courts would have virtually unrestricted control of the

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[12] See also *Ford* v. *Allen*, 728 F.2d 1369, 1370 (11th Cir. 1984); *Wiggins* v. *County of Alameda*, 717 F.2d 466, 469 (9th Cir. 1983), cert. denied *sub nom. California Dep't of Corrections* v. *United States*, No. 83-634 (Feb. 27, 1984); *Ballard* v. *Spradley*, 557 F.2d 476, 481 (5th Cir. 1977).

operation of the Marshals Service. Under petitioner's view, the fact that a court issues an order to the Marshal to carry out a specified action would necessarily establish authorization for the order, since it could equally be said there as here that the Marshal is simply being required to execute the court's order in compliance with Section 569(b). The only limitation on the court's authority over the Marshal would be whatever limits exist on its authority to prescribe the substantive terms of the order; any order that the court is empowered to enter could, if the court chooses, be directed to the Marshal in the first instance. Thus, just as petitioner seeks to justify the order in this case, myriad orders now issued in litigation could, in the discretion of the court, be imposed on the Marshal. Such an unreasonable and circular interpretation of the statute must be rejected.

In support of its argument, petitioner also cites 28 U.S.C. 567(2), which states that "[u]nder regulations prescribed by the Attorney General, each United States marshal shall be allowed * * * the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards * * *." [13] However, this statute does not resolve—indeed, it is entirely silent on—the issue of the Marshal's substantive authority to transport prisoners; it merely provides for the payment of federal funds for expenses that the Marshal incurs in transporting prisoners as otherwise authorized by law. Moreover, even if the statute permits the Marshal to use appropriated funds for the transportation of state prisoners in the circumstances of this case, that would in no way relieve petitioner of its traditional obligations under the ad testificandum writ or authorize the magistrate to require the federal treasury to bear the expense of producing the state prisoners in court. See *Story* v. *Robinson*, 689 F.2d 1176, 1179

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[13] See also *Ford* v. *Allen*, 728 F.2d at 1370; *Wiggins* v. *County of Alameda*, 717 F.2d at 469; *Ballard* v. *Spradley*, 557 F.2d at 481.

(3d Cir. 1982); *McGee* v. *Rankin*, 584 F. Supp. at 1204. It is one thing for Congress to appropriate funds to enable the Marshal to perform his given functions; it is quite another for a federal court to direct the Marshal to expend those funds in order to satisfy a duty that the law imposes on someone else. And under petitioner's reading, the statute would authorize courts to require the Marshal to transport state prisoners even in state proceedings.[14]

Contrary to petitioner's argument, the Marshals Service has construed Section 567(2) to apply only to prisoners either held in federal custody or transported under a cooperative or intergovernmental agreement. See 28 C.F.R. 0.111(j) and (k). That construction is premised on the Marshal's authority over federal prisoners and over other prisoners where provided by cooperative or intergovernmental agreement. In contrast, there is no basis for requiring the Marshal to transport state prisoners in connection with a civil rights action to which the federal government is not a party.

Indeed, the Marshals Service has specifically concluded that it is not responsible for transporting state prisoners in the circumstances of the instant case. The current Manual of the Marshals Service provides:

> Traditionally, writs of habeas corpus for cases in which the Federal government is not a party, are executed by the prisoner's custodian. If the court orders the U.S. Marshal and the state to produce a state prisoner, such as in the case of a civil rights issue, the U.S. Marshal should attempt to have the court amend its order so it is directed solely to the state custodian. If this attempt fails the U.S.

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[14] Courts have recognized that federal funds generally are not authorized for the transportation of state prisoners in actions to which the United States is not a party. See *Clark* v. *Hendrix*, 397 F. Supp. 966, 975 (N.D. Ga. 1975); *Diaz* v. *Chatterton*, 229 F. Supp. 19, 22, 23 (S.D. Cal. 1964); *Urbano* v. *Sondern*, 41 F.R.D. at 358.

> Marshal should serve the writ directed to him on the state custodian, inform the state custodian of the state's obligation to produce the prisoner, and make an appropriate return on the writ as executed. It is the position of the Marshals Service that the state has the obligation to produce its state prisoners to Federal court once such a writ of habeas corpus is issued.
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> * * * * *
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> *State Prisoners in Federal Civil Cases.* The custodian of the prisoner is responsible for transporting and producing state or local prisoners in a Federal civil case. The Federal court order should be directed to the state or local authority who has custody of the prisoner. * * *

U.S. Dep't of Justice, *United States Marshals Manual* §§ 6.1-4.c.3, 8.5-5.b (Sept. 1983). Similarly, the Manual in effect at the time the ad testificandum writs were issued in the present case provided:

> It is the Marshals Service's position that in Federal civil rights suits filed by state prisoners against state officials the state should transport the prisoner to and from Federal Court and bear any of the prisoners having expenses. The Marshals Service should *not* reimburse the state for any of their expenses. If the Marshal is ordered to transport such prisoners, the United States Marshals Service Legal Counsel should be immediately notified.

U.S. Dep't of Justice, *United States Marshals Financial Management Manual* 340.26 (July 1, 1975) (emphasis in original).[15] The Marshals Service's interpretation of its own authority is entitled to substantial deference by the courts. See, *e.g.*, *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978).[16]

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[15] This provision is carried forward in Section 3.15-19.c.3 of the *United States Marshals Manual.*

[16] Petitioner argues (Pet. Br. 45-46 n.19) that the 1975 Manual obligates the Marshal either to transport state prisoners to federal

For these reasons, 28 U.S.C. 567(2) and 569(b) do not support petitioner's contention that the Marshals Service can be required to transport the state prisoners to court in this case. Moreover, this conclusion is reinforced by a comparison of those statutes to other provisions of law that do specify a role for the federal government in the process of obtaining witnesses. For example, 28 U.S.C. 1825 provides that the Marshal shall pay the fees both for government witnesses in cases in which the United States is a party and for the witnesses of a party proceeding in forma pauperis in cases under 28 U.S.C. 2255.[17] See also pages 40-41, *infra*. In addition, Fed. R. Crim. P. 17(b) states that with respect to a subpoena on behalf of an indigent criminal defendant, "the costs incurred by the process and fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government." The Marshals Service advises us that, in the many cases covered by these provisions, it rather than the state has assumed the responsibility for producing state prisoners in court. These provisions, however, represent specific authorizations for the involvement

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court or to reimburse the state for their transportation. However, the passage relied upon by petitioner relates to the production of state prisoners in cases in which the United States is a party, since it refers to the participation of the United States Attorney in the process of producing the prisoner; as discussed below (see pages 29, 40, *infra*), 28 U.S.C. 1825 expressly provides that in cases in which the federal government is a party, the Marshal shall pay the fees for the government's witnesses. Furthermore, the cited passage cannot be interpreted as petitioner proposes, for it is immediately followed by the specific provision, quoted in the text above, that "in Federal civil rights suits * * * the state should transport the [state] prisoner to and from Federal Court and bear any of the * * * expenses."

[17] 28 U.S.C. 1825 also provides for the Marshal to pay witness fees for an indigent party challenging a state conviction in habeas corpus cases under 28 U.S.C. 2254.

of the federal government and constitute particular exceptions adopted by Congress to the general obligation of a custodian pursuant to a writ of habeas corpus ad testificandum. In contrast, 28 U.S.C. 567(2) and 569(b) cannot be read to provide the same specific and exceptional authorization for the Marshal to transport the state prisoners in this case. See also pages 40-41 and note 33, *infra*. Where Congress has prescribed limited exceptions as a matter of policy, courts are not free to create additional exceptions. See, *e.g.*, *Block* v. *Community Nutrition Institution*, No. 83-458 (June 4, 1984), slip op. 6; *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 (1981).

Finally, petitioner suggests (Pet. Br. 37-38) that the expense of producing state prisoners in court, like the expenses of providing a judge and a courtroom, should be met by the federal government as a necessary cost of furnishing a forum for the resolution of lawsuits under 42 U.S.C. 1983. However, witness expenses are not traditionally considered to be a cost of the tribunal, but instead are customarily borne by the parties to the litigation or by the witnesses themselves. See 28 U.S.C. 1821, 1920(3); see also page 13, *supra*, and pages 35-36, *infra*. On the other hand, the costs of a judge or a courtroom, which are inherent features of the judcial process, are traditionally treated as part of the administration of the system of justice (see, *e.g.*, *Gleckman* v. *United States*, 80 F.2d 394, 403 (8th Cir. 1935), cert. denied, 297 U.S. 709 (1936)), and Congress in fact has made express provision —out of appropriations for the Judicial rather than the Executive Branch—to pay those expenses. In the absence of a similar congressional enactment applicable to state prisoners, and in light of the custodian's established obligation to bring its prisoners to court, petitioner's attempted analogy is unpersuasive and affords no basis for shifting the cost of production from the state to the federal government.

3. *Requiring The Marshals Service To Transport State Prisoners Would Impose A Significant Burden On The Federal Government*

If Garland and his proposed witnesses were federal rather than state prisoners, the Marshals Service would be responsible for transporting them to court pursuant to a writ of habeas corpus ad testificandum. The result we urge in this case simply recognizes the corresponding obligation of petitioner with respect to prisoners in its custody.

Petitioner complains (Pet. Br. 16), however, that such an obligation would constitute a "dramatic drain on the state's financial resources * * *." At the same time, petitioner contends (Pet. Br. 36-37) that requiring the Marshals Service to transport state prisoners would *not* impose a significant burden on the federal government. Petitioner's argument is thus internally inconsistent and also ignores the practicalities of the issue.

The burden on the Marshals Service cannot be viewed in the context of an individual case or the litigation involving a single state. Instead, it must be considered in the aggregate on a nationwide basis. Given the burgeoning number of civil rights suits by state prisoners against state or local defendants,[18] it blinks reality for petitioner to assert that the Marshal would not be subjected to substantial demands and expense in transporting state prisoners.

Moreover, the Marshals Service, no less than other units of the federal government, is facing serious budget constraints.[19] Indeed, the Marshals Service advises us

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[18] The number of civil rights actions filed in federal court by state prisoners against state or local defendants has increased from 2,030 in 1970 to 18,034 in 1984. See U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1983*, Table 5.24, at 514; Administrative Office of the United States Courts, *1984 Annual Report of the Director*, Table C2, at A-7.

[19] See, *e.g.*, 128 Cong. Rec. H9848-H9849 & n.1, H9849-H9850, H9852, H9853-H9854 (daily ed. Dec. 15, 1982) (amendment to

that there are only 21 deputy marshals in the Eastern District of Pennsylvania and fewer than 1,000 deputy marshals in the 94 districts across the country. The limitations on the Marshals Service's manpower become evident in light of the fact that the federal judicial system currently has some 500 active district judges (and 200 senior district judges) and approximately 250 full-time magistrates (with 230 part-time magistrates), as well as additional judges in the Bankruptcy Court, the Claims Court, and the District of Columbia Superior Court. Furthermore, approximately 500 federal court facilities are now in use. And in 1984 the Marshals Service handled more than 82,000 prisoners in connection with federal matters. To require the Marshals Service to transport state prisoners would divert it from the functions that Congress has entrusted to it, including its responsibilities for federal prisoners, the security of the federal courthouse and court personnel, the execution of arrest warrants and seizure of forfeited property, and numerous other duties necessary to law enforcement and the federal court system.

Petitioner advances an expansive view of the role of the courts, contending that "the tools available to the judiciary must be used creatively in order to respond to changing demands on the judicial system" (Pet. Br. 17). However, courts are ill-suited to assess the foregoing considerations. Rather, it is a policy question for *Congress* whether the United States Marshals Service should transport state prisoners to court in suits under 42 U.S.C. 1983.[20] A legislative solution would allow Congress to

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Fed. R. Civ. P. 4 on service of process by Marshal); 102 F.R.D. 423, 424, 439 (1984) (proposed amendments to Federal Admiralty Rules on service of process by Marshal); Joint Statement of the Chief Justice and the Attorney General Before the Judicial Conference of the United States (Mar. 11, 1982) (courthouse security).

[20] Compare, *e.g.*, the Interstate Agreement on Detainers Act, 18 U.S.C. App. at 545-548. In Section 2, Article V (a) and (h), the Act specifically provides that the sending "State shall offer to de-

weigh the various competing interests—of the federal government, the states, and the litigants in civil rights actions—in this era of expanding judicial dockets and limited governmental resources at all levels; it is eminently a choice for Congress to make whether the funds allocated to the Marshals Service should be spent for transporting state prisoners in connection with Section 1983 litigation or whether they instead would be better used to support other aspects of the federal judicial system. See Pet. App. 44a-45a (Becker, J., concurring). In addition, Congress can also consider a variety of systemic mechanisms and alternative approaches—such as the presentation of testimony through depositions taken in the prison, or sending magistrates to conduct proceedings at the prison where necessary—to reduce the problem of transporting prisoner witnesses. Finally, legislation could take account of the range of historical practices and understandings that have been developed in light of local conditions in the districts and divisions around the country.[21]

Until such time as Congress provides to the contrary, however, it is the established obligation of the custodian to produce a prisoner in court pursuant to a writ of habeas corpus ad testificandum. Neither the All Writs Act nor the Marshals statute authorizes the magistrate in this case to relieve petitioner of that obligation or to shift

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liver temporary custody of [the requested] prisoner to the appropriate authority in the [receiving] State * * *" and that "[f]rom the time that [the receiving] State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the [receiving] State * * * shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner."

[21] It might also be possible for the Marshals Service or the Marshal in each district to enter into an agreement with a state to provide for appropriate transportation procedures.

to the Marshals Service the responsibility of transporting state prisoners.[22]

C. Although Petitioner Is Obligated To Produce Its Prisoners In Court, The Parties To The Underlying Civil Rights Action May Be Required To Provide Reimbursement To Petitioner For Its Expenses

Because the obligation to produce the requested state prisoners in court rested on petitioner as their custodian and could not be shifted to the United States Marshals Service, the judgment of the court of appeals reversing the magistrate's order should be affirmed. This is not to say, however, that petitioner must ultimately bear the entire cost of that production. Rather, it is possible that the parties to the underlying civil rights action should defray at least a portion of those costs. Although the Court need not resolve this issue in order to decide the question that petitioner has presented, we think it appropriate to outline our preliminary analysis of the issue to make clear that a rejection of petitioner's position here does not mean that the costs of production will necessarily be borne by petitioner in the end.

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[22] If the Court concludes, contrary to our submission, that a trial court has discretion to require the Marshal instead of the state to undertake to transport state prisoners, that discretion should be restricted to exceptional circumstances where considerations of safety or security demonstrate that the Marshals Service, because of special training, equipment, or other capability or resource, is materially better able than the state to transport the prisoners. This would reflect the traditional requirements of the writ of habeas corpus ad testificandum and would be consistent with the nature of the All Writs Act, since the aid of the Marshal would be confined to those cases in which it is necessary to the proper effectuation of the court's writ. In the present case, petitioner has not contended that it could not comply with the writ by bringing its prisoners to the courthouse. The transportation responsibility should not be shifted to the federal government, as was done here, simply because of its "deep pocket" or the supposition that it could convey the prisoners at an incrementally lower cost than the state.

Since petitioner is required to bring its prisoners to court pursuant to the ad testificandum writ, it will, in the first instance, incur the costs of production. In our view, the issue whether the parties to the underlying lawsuit should reimburse petitioner for those costs is properly analyzed by reference to the customary legal rules for imposing witness expenses in litigation. This analysis proceeds along the following lines.

1. If a non-indigent plaintiff [23] seeks to subpoena a non-prisoner witness to appear at trial in a federal lawsuit, he is required to pay the witness the prescribed fees for attendance and mileage. See 28 U.S.C. 1821(b) and (c); Fed. R. Civ. P. 45(c) and (e). In addition, a witness who is not incarcerated is entitled to a designated subsistence allowance for necessary overnight stays. See 28 U.S.C. 1821(d). These witness expenses are taxable as costs to the losing party at the conclusion of the action. See 28 U.S.C. 1920(3); Fed. R. Civ. P. 54(d). Thus, as between the parties, these specified witness expenses are generally imposed on the unsuccessful litigant. Moreover, if a prevailing party incurs witness expenses that are not covered by statute, the district court has a limited discretion to tax those non-statutory costs to the losing party as well. See, *e.g.*, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232, 234-235 (1964); *Fressell* v. *AT & T Technologies, Inc.*, 103 F.R.D. 111, 112, 116 (N.D. Ga. 1984); *Ingersoll Milling Machine Co.* v. *Otis Elevator Co.*, 89 F.R.D. 433, 435 (N.D. Ill. 1981).

The statutory fees allowed to a witness can be significantly less than his out-of-pocket and opportunity costs in being required to testify. Although Congress sought to provide fees that would " 'be reasonably fair to the average witness,' " it " 'recognized that certain witnesses will not * * * be adequately compensated.' " H.R. Rep.

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[23] In order to parallel the facts of the present case, this discussion is framed in terms of a witness sought by the plaintiff. The same analysis applies, however, whichever party offers the witness.

95-1651, 95th Cong., 2d Sess. 3 (1978) (citations omitted). The amounts provided constitute "the minimally acceptable level" of payment but are not "intended as reimbursement for lost income, witness service being a public obligation for which the Government is not required to provide compensation" (*ibid.*). See also S. Rep. 95-756, 95th Cong., 2d Sess. 2 (1978). In those instances in which the statutory fees do not provide full compensation, the witness himself must bear the remaining cost as part of his public duty to give testimony. See *Hurtado* v. *United States*, 410 U.S. 578, 589 (1973).

Thus, under the rules of federal civil litigation, the expenses of obtaining a witness to testify are generally divided among the plaintiff, the defendant, and the witness. Initially, the party presenting the witness must incur the expenses specified by statute, which are later taxed to the losing side as costs. Any additional witness expenses incurred by the propounding party will normally remain its responsibility, but, in the exercise of the district court's discretion in exceptional cases, they can be taxed in whole or in part to the unsuccessful litigant. Finally, to the extent that these payments are not fully adequate, the witness himself must absorb the costs of his appearance.

2. Where a non-indigent plaintiff seeks the testimony of a prisoner witness, a number of different considerations arise. As noted above (see pages 10-11, *supra*), the plaintiff must obtain a writ of habeas corpus ad testificandum rather than a subpoena for the witness. In addition, because he is incarcerated and will be transported by the custodian, the witness is not entitled to the statutory fees for attendance, mileage, or subsistence.[24] And, most importantly for present purposes, the cost of production will include those expenses necessary to main-

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[24] See 28 U.S.C. 1821(d)(1); *In re Grand Jury Matter*, 697 F.2d 103 (3d Cir. 1982), aff'g 533 F. Supp. 401 (E.D. Pa.); *Marchese* v. *United States*, 453 F.2d 1268, 1270-1271 (Ct. Cl. 1972); *Meadows* v. *United States Marshal*, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971).

tain custody of the prisoner and ensure his secure transfer.

Here, too, the general rules described above provide the proper analytical framework. The plaintiff, as the proponent of the witness, can fairly be expected to bear his share of the witness expenses. At the least, he should contribute to the overall cost an amount approximating what he would have had to expend if the witness were not a prisoner—that is, attendance fees, mileage, and subsistence. In addition, the court would have to decide whether the remaining expenses should be borne by the plaintiff—who seeks to offer the witness's testimony as part of his case and must take his witnesses as he finds them—or whether a portion of those expenses should be imposed on the state custodian—which has a penal interest in the continued confinement of the witness and has a public duty to produce relevant evidence in its possession. See *United States* v. *$64,000.00 in U.S. Currency*, 722 F.2d 239, 246-247 (5th Cir. 1984).[25]

3. Finally, there is the situation, which is presented in this case, of a plaintiff proceeding in forma pauperis who seeks the testimony of a prisoner witness. The foregoing analysis is equally applicable here unless the law excuses an indigent plaintiff from those expenses of production that would otherwise be imposed on him.[26]

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[25] As between the plaintiff and the custodian, the same general analysis applies where the plaintiff is himself a prisoner and seeks to be present for trial. However, with respect to the taxation of those expenses as costs if the defendant is the losing party, a somewhat different analysis would be applicable. Under general principles, a party usually pays its own expenses of traveling to and attending trial, but a district court has some discretion to tax those expenses as non-statutory costs. See, *e.g.*, *Hodge* v. *Seiler*, 558 F.2d 284, 287 (5th Cir. 1977). Accordingly, a plaintiff, even if he prevails, may be required to bear a greater portion of such expenses than would be appropriate in the case of witness expenses.

[26] See *Marks* v. *Calendine*, 80 F.R.D. 24, 31 (N.D. W. Va. 1978), aff'd, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (unsuccessful indigent prisoner-plaintiff in Section 1983

Neither of the two statutes relevant to this issue establishes such an exemption.[27]

First, 28 U.S.C. 1915(a), which provides for proceedings in forma pauperis, states that a court "may authorize the commencement, prosecution or defense of any suit * * * without prepayment of fees and costs or security therefor * * *." If leave is granted, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." 28 U.S.C. 1915 (c). In addition, "[j]udgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred." 28 U.S.C. 1915(e).

As this language indicates, in forma pauperis plaintiffs may proceed without "prepayment" of fees and costs. While an indigent plaintiff is thus excepted from prepaying specified expenses, nothing releases him from liability for such expenditures at the conclusion of the case if he is unsuccessful.[28] Indeed, not only must the losing plaintiff bear his own litigation expenses, but under Section 1915(e) he may be taxed his opponent's costs as

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action ordered to bear custodian-defendant's expenses of producing plaintiff and his prisoner-witnesses pursuant to ad testificandum writ).

[27] In the absence of statutory authorization, principles of sovereign immunity would, of course, preclude the imposition of liability for these costs on the United States. See, *e.g.*, *United States* v. *MacCollom*, 426 U.S. 317 (1976); *Fairmont Co.* v. *Minnesota*, 275 U.S. 70, 73-74 (1927); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20 (1926).

[28] See, *e.g.*, *Barcelo* v. *Brown*, 655 F.2d 458, 462 (1st Cir. 1981); *Flint* v. *Haynes*, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), aff'g *Marks* v. *Calendine*, 80 F.R.D. 24 (N.D. W. Va. 1978); *Partee* v. *Lane*, 528 F. Supp. 1254, 1264-1265 (N.D. Ill. 1981); but see *Evans* v. *Tennessee Dep't of Corrections*, 514 F.2d 283 (6th Cir. 1975).

well even where his position, although unavailing, was not frivolous or advanced in bad faith.[29]

Furthermore, 28 U.S.C. 1915 does not extend to witness fees and expenses and therefore does not impose responsibility for those expenditures on the federal government rather than the plaintiff. By its terms, Section 1915(c) provides that the court shall issue and serve all process without charge;[30] Section 1915(b) directs that in certain circumstances the government shall pay for the preparation of a transcript and the printing of the record on appeal; and Section 1915(d) authorizes the appointment of counsel for an indigent party. Nowhere, however, does Section 1915 refer to the expenses of producing witnesses in court. On the contrary, Section 1915(c) specifically states that "[w]itnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." And Section 1915(e) further provides that "the United States shall not be liable for any of the costs * * *" in the proceeding.[31] In light of these statutory provisions, courts have held that Section 1915 does not "authorize[] a district court to order government payment of an indigent's witness fees and expenses." *United States Marshals Service* v. *Means*, 741 F.2d 1053, 1056 (8th Cir. 1984) (en banc).[32] Likewise,

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[29] See, *e.g.*, *Harris* v. *Forsyth*, 742 F.2d 1277 (11th Cir. 1984); *Flint* v. *Haynes*, 651 F.2d at 973; *Chevrette* v. *Marks*, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983); cf. *Duhart* v. *Carlson*, 469 F.2d 471 (10th Cir. 1972), cert. denied, 410 U.S. 958 (1973); see also H.R. Rep. 1079, 52d Cong., 1st Sess. 2 (1892).

[30] See also Fed. R. Civ. P 4(c)(2)(B)(i).

[31] See S. Rep. 1020, 82d Cong., 1st Sess. 17 (1951).

[32] See also, *e.g.*, *Johnson* v. *Hubbard*, 698 F.2d 286, 289-290 (6th Cir.), cert. denied, 464 U.S. 917 (1983); *Hudson* v. *Ingalls Shipbuilding*, 516 F. Supp. 708, 709 (S.D. Ala. 1981); *Dortly* v. *Bailey*, 431 F. Supp. 247, 248 (M.D. Fla. 1977); *Clark* v. *Hendrix*, 397 F. Supp. 966, 975 (N.D. Ga. 1975); *Diaz* v. *Chatterton*, 229 F. Supp. 19, 23 (S.D. Cal. 1964); *Andrews* v. *Atkins*, 100 F.R.D. 762, 764, 765 (D. Kan. 1984); *Cagle* v. *Cox*, 87 F.R.D. 467, 468 (E.D. Va.

the Comptroller General has determined that the United States cannot be required to pay an indigent plaintiff's witness expenses in an action under 42 U.S.C. 1983.[33]

In addition, 28 U.S.C. 1825 does not render the United States responsible for the witness expenses of an in forma pauperis plaintiff. In our view, the first paragraph of Section 1825, which provides that in cases in which the United States is a party "the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States Attorney," is limited to the fees of witnesses for the government.[34] In any event, that provision has no application in the present case, since the United States is not a party to the underlying Section 1983 action.

The second paragraph of Section 1825 also does not authorize federal payment in this case. While that provision does direct the Marshal to pay the fees of a witness for an indigent party, it is explicitly confined to "proceedings * * * for a writ of habeas corpus or * * * proceedings under [28 U.S.C.] 2255" and therefore does not apply to a civil rights suit under 42 U.S.C. 1983. Indeed, in enacting this provision, Congress emphasized that witness fees for indigent defendants in criminal prosecutions are paid by the United States pursuant to Fed. R.

1980); *Marks* v. *Calendine*, 80 F.R.D. at 29; cf. *Lloyd* v. *McKendree*, 749 F.2d 705 (11th Cir. 1985); *Barcelo* v. *Brown*, 655 F.2d at 462; *Lewis* v. *Precision Optics, Inc.*, 612 F.2d 1074 (8th Cir. 1980); *Estep* v. *United States*, 251 F.2d 579, 582 (5th Cir. 1958); *Moss* v. *ITT Continental Baking Co.*, 83 F.R.D. 624, 625-627 (E.D. Va. 1979); *Haymes* v. *Smith*, 73 F.R.D. 572, 574 (W.D. N.Y. 1976).

[33] See 53 Comp. Gen. 638, 643-645 (1974); 39 Comp. Gen. 133, 138-139 (1959), overruled in part on other grounds, 59 Comp. Gen. 313 (1980); Comp. Gen. Dec. B-139703 (June 19, 1975) (reaffirming 53 Comp. Gen. 638 (1974)).

[34] See *United States Marshals Service* v. *Means*, 741 F.2d at 1064 (McMillian, J., concurring in part and dissenting in part); but see *id.* at 1060-1061 (Gibson, J., concurring separately).

Crim. P. 17(b) and that collateral habeas corpus and Section 2255 proceedings, while technically civil, are integrally related to a criminal case; at the same time, however, Congress recognized that in other situations there is no "basis to charge the United States with witness costs in civil proceedings." H.R. Rep. 56, 89th Cong., 1st Sess. 3 (1965), citing 39 Comp. Gen. 133 (1959); see also S. Rep. 615, 89th Cong., 1st Sess. 3 (1965). This legislative history, and the absence of a comparable provision authorizing such payment in civil suits generally, strongly reinforces the conclusion that the United States is not liable for the witness expenses of a plaintiff proceeding in forma pauperis in an action under 42 U.S.C. 1983.

Holding unsuccessful in forma pauperis plaintiffs responsible for their witness expenses provides a measure of accountability in the litigation process. Otherwise,

> persons granted leave to proceed in forma pauperis have virtually "nothing to lose and everything to gain," and the purpose of § 1915—equal access for the poor and the rich—is distorted. Non-indigents who contemplate litigation are routinely forced to decide whether their claim is "worth it." We see no reason to treat indigents differently in this respect.

Harris v. *Forsyth*, 742 F.2d at 1278, quoting *Flint* v. *Haynes*, 651 F.2d at 973 (footnotes omitted). Especially in view of the inherent temptations for prisoners to seek to be brought to court (see pages 12-13 note 6, *supra*), this is a salutary and appropriate restraint in connection with the ever-increasing number of inmate actions.

We recognize, of course, that requiring indigent plaintiffs to reimburse the state custodian for a portion of its transportation costs will prove to be of little practical benefit to the state in some cases. But that will not always be so. For example, if the plaintiff prevails in the civil rights suit, he can use his damages award to pay the portion of the expenses that are allocated to him and not taxed to the losing defendant. Even if the plaintiff does

not prevail in the litigation, the state will have a claim to any funds he may subsequently obtain. To the extent that the state is nevertheless unable to collect reimbursement for the plaintiff's share of the transportation expenses, that burden must be borne as part of its public duty as custodian to produce its prisoners in court pursuant to a writ of habeas corpus ad testificandum.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NO. 84-489

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1984

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION

Petitioner

v.

UNITED STATES MARSHALS SERVICE, et al.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. In our main brief we outline the authority and policies which support the conclusion that the All Writs Act (28 U.S.C. §1651) serves as the source for the District Court's order directing the Marshal to take custody of state prisoners and produce them in federal court. The Marshal's central thesis in resisting our submission, stripped of its substantial verbiage, is the argument that the All Writs Act may not supply authority for a court order "[w]here a legal rule or doctrine specifically addresses the particular question under consideration." Resp. Br. 21. In the Marshal's view, because the habeas corpus provisions specifically authorize the issuance of writs for the purpose of securing the presence of prisoners to testify (28 U.S.C. §2241(c)(5)) and also

require that those writs be addressed to the custodian (28 U.S.C. §2243), the All Writs Act does not provide authority for an order requiring anyone other than the present custodian to produce the prisoner. The Marshal's narrow view comports neither with the broad terms of the All Writs Act nor with the flexibility this Court has accorded the statute.

The Court has characterized the All Writs Act as "a legislatively approved source of procedural instruments designed to achieve the 'rational ends of the law.'" Price v. Johnston, 334 U.S. 266, 282 (1948), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942). The All Writs Act provides the means for softening the rigidity with which ancient practice has endowed the writ of habeas corpus; "[j]ustice may on

occasion require the use of a variation or a modification of an established writ." Price v. Johnston, supra, 334 U.S., at 283-284. The modification of the traditional habeas corpus writ crafted by the District Court in this case is consistent with the Court's practice of permitting sensible, appropriately confined variations or modifications of existing writs when justice so requires.

a. The Marshal's reliance on the historical practices governing habeas corpus and the provisions of 28 U.S.C. §2243 which carry forward those practices runs afoul of the Court's admonition that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." Adams v. United States ex rel. McCann, 317 U.S., at 274. To be sure, the fact

that there exists a specific procedural instrument to secure prisoners for testimony in court is not irrelevant - but that point is the beginning, not the end, of the initial inquiry whether the magistrate's order was "necessary or appropriate" in aid of his jurisdiction. 28 U.S.C. §1651(a). Congress has recognized, by its endorsement of the All Writs Act from 1789 through today, that, prescient as that lawmaking body may be, it never has been able to anticipate all of the circumstances which may arise in the courts. The general grant of authority contained in the All Writs Act permits the federal courts to be creative in designing new procedural instruments necessary to insure that justice is done. The achievement of this purpose may require the courts to act creatively in an area partially covered by other

specific procedural tools or in a sphere untouched by Congressional action. The appropriate question is not whether Congress ever has legislated in the field, but whether the action serves the interests of justice. Adams v. United States ex rel. McCann, supra, 317 U.S., at 274.

In order to analyze the nature and consequences of the writ issued by the magistrate to the Marshal, it is necessary to examine the setting in which the writ was issued. Here, the case on the merits is one brought pursuant to the Civil Rights Act, 42 U.S.C. §1983, a statute enacted by Congress as a vehicle for remedying violations of constitutional rights committed under color of state law. The federal courts are the primary forum designated by Congress for the vindication of these rights.

In order for the federal courts to exercise their jurisdiction in civil rights actions, it is often necessary for the parties to appear in court in person. While writs of habeas corpus ad testificandum certainly were a part of the common law, civil rights litigation of the nature and scope generated by current federal statutes just as certainly was unknown. The demands imposed on custodians by the number of civil rights actions is a novel development and this burden is relevant to a trial court's initial determination of whether to issue a writ for the production of inmates. In deciding whether or not to issue a writ ordering the production of an inmate-plaintiff or inmate-witness, the trial court often is deciding whether or not it will exercise meaningful jurisdiction in these cases,

because without live testimony from the plaintiff or his witness, the case often will be dismissed. It is at this point, when the trial court is balancing the interests of the custodian versus the interests of a litigant whose remedy has been provided by Congress, that the court's ability to exercise its jurisdiction may be defeated or, at least, impaired because the scales tip against the inmate-plaintiff. It is then that the authority of the federal courts to issue writs in "aid of their respective jurisdictions" may be utilized to effectuate the remedial goals of the Civil Rights Act.

The magistrate recognized that the transportation responsibilities imposed upon the petitioner in this case were substantial. The Marshal concedes that the burden on the custodian is a factor

to be weighed in deciding whether to order production of prisoners. Resp. Br. 12. Faced with the difficult choice of imposing an unusually heavy burden on the custodian or, perhaps, weakening the strength of the record by denying the inmate-plaintiff's requests for witnesses, the magistrate sought another procedural tool to break this impasse. Familiar as he was with the duties of the Marshal in the district, the magistrate concluded that the solution which best served the interests of justice was to call upon the Marshal for assistance. The magistrate concluded, and the Marshal does not dispute, that this particular order imposed no measurable burden on the Marshal who routinely transports prisoners between the federal courthouse and the local detention center. Under these circumstances, it is clear that the

order under review was "necessary or appropriate" under the All Writs Act. Only adherence to "dry formalism" supports the contrary position taken by the Marshal.[1]

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[1]The Court has rejected the notion, advanced by the Marshal (Resp. Br. 18), that there must be "specific legislative authorization" before a district court may enlist the aid of third parties. United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). The federal courts have been invested by Congress with the authority to compel the assistance of third parties when, even though not strictly "necessary," the aid of strangers to the litigation nevertheless is "appropriate" in permitting the court "to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, supra, 317 U.S. at 273. There can be no question, and the Marshal does not dispute, that the order under review here is a perfectly appropriate, rational solution to the burden faced by state custodians who are required to transport for great distances many prisoners whose presence is required in court.

b. Similar considerations support the conclusion that the order under review is, as required by the All Writs Act, "agreeable to the usages and principles of law." 28 U.S.C. §1651. Certainly, transfer of custody violates no positive Congressional command or common law rule. Rather, the order modifies traditional procedure to account for modern developments. The essential principle underlying the writ of habeas corpus ad testificandum is that of affording the courts an efficacious procedure for securing the testimony of a prisoner. This principle hardly is subverted by a modification of the writ directing transfer of the prisoner from the custodian to a substitute custodian.

Moreover, whatever standards exist to govern and define the role of the Marshal are consistent with the duties imposed by

the order here. Marshals are assigned to various judicial districts to, among other things, attend court and transport prisoners. See 28 U.S.C. §§567, 569. The duties imposed upon the Marshal in this case are consistent with the Marshal's normal duties. At least in the absence of a showing that a substantial burden has been imposed on the Marshal, a transfer of custody order like the one under review here is agreeable to the governing principles and usages of law.[2]

2. Without formally invoking the doctrines of sovereign immunity and separation of powers, the Marshal argues

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[2]The Marshal's reliance on General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) is misplaced. In that case the Court held

FOOTNOTE CONTINUED ON NEXT PAGE

that the case must be "analyzed in light of general principles of sovereign immunity and separation of powers." Resp. Br. 17. This argument misses the mark.

Certainly, Congress has authorized the Marshal to attend court sessions and transport prisoners. 28 U.S.C. §567, 569. The expenditure of federal money

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

simply that the All Writs Act did not authorize a district court to allocate to one of the parties a portion of the cost of the remedial decree without specifically finding that the party was liable. This case is clearly distinguishable; the Marshal is not a party to the underlying litigation and it cannot be contended seriously that the trial court must find liability against the Marshal before a writ in the nature of a habeas corpus can be issued against the officer. Furthermore, unlike the situation in General Building Contractors Assn., the writ to the Marshal is not "a remedy" to petitioner or to the original plaintiff; the writ is merely an aid to the process of the exercise of jurisdiction over civil rights actions.

for these general purposes has been approved by Congress. 28 U.S.C. §567. So there is general Congressional approval for activities covered by the order at issue here. The All Writs Act supplies the statutory authority for minor variations in the Marshal's duties. The Marshal's argument that there must be detailed, particular statutory authority for every direction to the Marshal essentially precludes the use of the All Writs Act if the order will have an effect on the federal government. The statute never has been, nor should it be, so narrowly cabined.[3] The better answer, and the

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[3]The Court has approved use of the All Writs Act to impose obligations on federal officials. See United States v. Hayman, 342 U.S. 205 (1952); Adams v. United States ex rel. McCann, supra.

one most consistent with Congressional intent, is that an order otherwise proper under the All Writs Act may call upon federal officials to assist the court.

Moreover, if concepts of sovereign immunity were applicable, the petitioner would be shielded from responsibility for compliance with the order at issue here by the Eleventh Amendment. If, as the Marshal suggests (Resp. Br. 17), the magistrate's order amounts to a judgment compelling the government to act or to expend money from its treasury, surely the Eleventh Amendment would bar the order. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 477 (1946).

The better view is, however, that Congress through a variety of measures has sought to ensure that the federal courts have the power creatively and efficiently to manage what now has become almost an overwhelming caseload. By virtue of the habeas corpus statutes, the laws governing the Marshal and the All Writs Act, Congress has authorized the courts to exercise their informed discretion in securing the presence of prisoners to testify in federal proceedings. This conclusion defeats any sovereign immunity or separation of powers claim.

3. The Marshal's hypothesis that petitioner may recover some of its costs in transporting prisoners to court from the parties to the underlying lawsuit reflects at least a partial misconception

of the problems facing state custodians. The burden which custodians face is not solely financial - the diversion of personnel from their normal tasks so that they may transport and remain with prisoners before, during and after their testimony puts a strain of the state's limited personnel resources, a strain which compromises the state custodian's principal concern which is, and must be, maintaining the security of the state prison. Under the circumstances of this case, the Marshal has not alleged any similar burden.

In any event, the Marshal stands on the same footing as petitioner - if we may recover costs from the litigants, so may he. Finally, as the Marshal recognizes (Resp. Br. 41), the ability to recover costs will be of little value in

many cases. It has been petitioner's experience that prisoners most often are called to testify on behalf of indigent parties from whom costs, even if awarded, cannot be recovered. In the final analysis, the Marshal's discussion, while interesting, is irrelevant to resolution of the question presented in this case.

CONCLUSION

For the reasons set forth above and in our main brief, the judgment of the Court of Appeals should be reversed.

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